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**GETTING REAL WITH
NONTRADITIONAL TRADEMARKS:
WHAT'S NEXT AFTER RED OVEN KNOBS,
THE SOUND OF BURNING METHAMPHETAMINE,
AND GOATS ON A GRASS ROOF?***

*By Anne Gilson LaLonde** and Jerome Gilson****

I. INTRODUCTION

The great American marketing engine has generated a torrent of nontraditional trademarks since our 2005 article on the subject.¹ In the pantheon of sound, flavor, texture, color, scent, and product shape, these marks continue to enliven trademark law and captivate trademark lawyers. They are rarely mundane, occasionally brash, curious, or puzzling, but often creative and witty.

Consider some examples, many from the last five years, not all of them protectable: “Tiffany” cupcakes with blue frosting and silver sprinkles, a folding chair (a mark for folding chairs), a wildcat growling (for insurance), the spoken words “WOO HOO!” (for lottery services), the sound of rhythmic mechanical human breathing (for costumes incorporating masks), a circular beach towel (for beach towels), the color purple (for brownies), Braille raised dots spelling STEVIE WONDER (for clothing and entertainment services), the scent of strawberries (for toothbrushes), a velvet texture on a wine bottle (for wines), a three-dimensional spray of water from a jet-propelled watercraft (for watercraft), a dripping red wax seal on a whiskey bottle (for

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** Author of *Gilson on Trademarks* (LexisNexis/Matthew Bender), Professor Member of the International Trademark Association.

*** Shareholder in the firm of Brinks Hofer Gilson & Lione, Chicago, Illinois, Associate Member of the International Trademark Association, original author of *Gilson on Trademarks*. Mr. Gilson is a member of the Past Presidents and Past Counsel of INTA. He served on the Association's Board of Directors (1977-1980), as Counsel to the Association (1991-1994), and as Reporter for the Association's Trademark Review Commission (1985-1987).

1. Jerome Gilson & Anne Gilson LaLonde, *Cinnamon Buns, Marching Ducks and Cherry-Scented Racecar Exhaust: Protecting Nontraditional Trademarks*, 95 TMR 773 (2005), Copyright © 2005 Matthew Bender & Company, Inc., a member of the LexisNexis Group. That article stands as a comprehensive review of the field as it was in 2005.

whiskey), and the famous Tarzan yell (for toy action figures). Earlier, in 2000, there was even a penguin-shaped cocktail shaker the United States Supreme Court immortalized as a questionable source indicator.² We will see, though, that cleverness alone does not ensure legal protection.

With few exceptions, “nontraditionals” are newcomers. Neither scent, texture, flavor, nor the term “nontraditional” was mentioned when the authoritative *Restatement of the Law (Third) of Unfair Competition* was published in 1995.³ But that year the Supreme Court took the lead in the landmark *Qualitex* case to etch the Dawning of the Age of the Nontraditional Trademark in stone.⁴ It held only that the color green-gold was eligible for federal registration for dry-cleaning pads. But, interpreting the Lanham Act in a most ebullient way, it trumpeted that a trademark could be “almost anything at all that is capable of carrying meaning.”⁵ Dictum, perhaps, but it flung the door wide open.⁶

The Court’s comments in *Qualitex* were so effusive they seemed to minimize the hurdles that must be overcome on the way to registration or enforcement. Yet it is clear, especially from the last five years, that the hurdles are high and getting higher.

2. See Part III.B *infra*.

3. Restatement of the Law (Third) of Unfair Competition, § 9 (“Definitions of Trademark and Service Mark”) & cmt. g (“Subject Matter”) (Mr. Gilson was an Adviser).

4. *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159 (1995). However, there was at least one earlier mention. In 1987, the United States (now International) Trademark Association urged Congress not to alter the statutory terms “symbol” or “device” so as to delete or narrow registration of “such things as a color, shape, smell, sound, or configuration which functions as a mark” in the Trademark Law Revision Act (1988). USTA Trademark Review Commission Report and Recommendations to the USTA President and Board of Directors, 77 TMR 375, 421 (1987). Mr. Gilson was the Trademark Review Commission Reporter and wrote the Report and Recommendations. In the legislative history of its Lanham Act overhaul, Congress relied heavily on the USTA position, and the Supreme Court quoted it in *Qualitex*. 514 U.S. at 172.

5. 514 U.S. at 162. In doing so, the Court raised the official role of the human senses to a new level. Before it, we used perhaps only 40% of our senses in perceiving, reacting to, being influenced by, and, yes, sometimes being confused by, trademarks. It was mainly sight and hearing, but now the Court has officially added the other 60%: touch, scent, and taste.

6. We can understand how a century ago the fledgling *Trademark Reporter* could declare packaging color to be an anti-trademark. In Volume 1, no less, it quoted the Commissioner of Patents as stating: “It is well settled that no one is entitled to the color of a package in which goods are placed as a trade-mark for such goods.” *Ex Parte Sinnamahoning Powder Mfg. Co.*, 170 O.G. 481, 1 TMR 294 (Comm’r 1911). Nevertheless, the publication has always accurately reflected the current state of trademark law, both then as now, and has reliably chronicled important developments, with myriad articles, briefs, book reviews, and editor’s notes. It will doubtless continue for decades, even centuries, hence.

Proving nonfunctionality, distinctiveness, and confusing similarity for sensory marks and product shape trade dress is never child's play. However, the United States Patent and Trademark Office has registered a significant number with corresponding evidentiary benefits, and it can be expected to continue doing so.

The lower-court enforcement decisions are generally negative, and there appear to be few decisions inviting a more indulgent appellate view. Also, since it has not exactly blazed a trail by promoting scent, texture, flavor, color, or sound as trademarks, the business community will have little appetite to litigate them. So the question remains: Can the business world transform an indifferent public into believing that yes, indeed, these unusual creatures can actually identify the source of products and services?

Here, then, we recap and update our 2005 article and take a fresh look at the issues inherent in enforcing nontraditional marks. We emphasize that enforcement is and will continue to be an enormous challenge.

II. OBSTACLES TO ENFORCEMENT AND REGISTRATION OF NONTRADITIONAL MARKS

Nontraditional marks face colossal obstacles seldom encountered on the same scale by typical word and logo marks. Proving a product shape to be nonfunctional, for example, is a seriously uphill battle, and there are numerous nontraditionals that qualify for the "don't even bother" category.

A. Distinctiveness and Failure to Function as a Trademark

Under Trademark Law 101, as with all trademarks, nontraditional marks can be registered, enforced, and protected only if they distinguish the mark owner's goods and services from those of others.⁷ At the outset, we note that several types of nontraditionals do not immediately point consumers to one particular source. Taking the Supreme Court at its word in connection with product shape and color, "we think consumer predisposition to equate the feature with the source does not exist."⁸ Indeed, these aspiring marks may appear to be no more than decorative and appealing aspects, or simply inherent

7. See Anne Gilson LaLonde, *Gilson on Trademarks* § 2.01 for more on distinctiveness in general and § 2A.03 for more on the distinctiveness of trade dress in particular.

8. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 213 (2000).

features, of the product. In the case of sound marks, for example, the Trademark Trial and Appeal Board (TTAB) requires a showing of acquired distinctiveness if the device making the sound emits it in the normal course of its operation, such as with phones and alarm clocks.⁹

Product shape, color, scent, flavor, and some sound marks can never be inherently distinctive.¹⁰ In fact, some may be incapable of *ever* acquiring distinctiveness, or secondary meaning. A showing of secondary meaning is expensive and difficult to make for most marks, but for nontraditional marks that are never inherently distinctive it may be capital-I Impossible. For example, the TTAB held in a color mark case that, “inasmuch as applicant is seeking registration of a color in a field where color is common, sales and advertising evidence would ordinarily not be sufficient by itself to demonstrate that its color has acquired distinctiveness.”¹¹

Even where a nontraditional mark can possibly be considered inherently distinctive, the mark owner must still make a showing of distinctiveness in order to register and enforce it. For example, one district court found that the product packaging trade dress for a nutritional supplement drink lacked inherent distinctiveness, as it was not unique or unusual.¹² If an applied-for mark is mere ornamentation, similarly, it does not serve as a trademark.¹³

B. Functionality and Aesthetic Functionality

Assuming the owner of a nontraditional mark can prove distinctiveness, the functionality doctrine may nevertheless bar

9. See *Nextel Commc'ns, Inc. v. Motorola, Inc.*, 91 U.S.P.Q.2d 1393 (T.T.A.B. 2009) (Mr. Gilson's law firm represented Motorola, Inc.); *In re Vertex Grp. LLC*, 89 U.S.P.Q.2d 1694 (T.T.A.B. 2009).

10. See *Gilson on Trademarks*, *supra* note 7, §§ 2.11[2][d] (color), 2.11[3] (scent), 2.11[4] (flavor), 2.11[6] (sound), 2.11[8][a] (product shape).

11. *Saint-Gobain Corp. v. 3M Co.*, 90 U.S.P.Q.2d 1425 (T.T.A.B. 2007). See also *In re Howard S. Leight and Assocs. Inc.*, 39 U.S.P.Q.2d 1058 (T.T.A.B. 1996) (noting that where “the use of colors is common in a field, an applicant has a difficult burden in demonstrating distinctiveness of its claimed color”).

12. *Vital Pharms., Inc. v. American Body Building Prods., LLC*, 511 F. Supp. 2d 1303 (S.D. Fla. 2007). See also *Trademark Manual of Examining Procedure* § 1202 (“Use of Subject Matter as Trademark”) (“In an application under §1 of the Act, the examining attorney must determine whether the subject matter for which registration is sought is used as a trademark. . . . Not everything that a party adopts and uses with the intent that it function as a trademark necessarily achieves this goal or is legally capable of doing so, and not everything that is recognized or associated with a party is necessarily a registrable trademark.”).

13. *Id.* §§ 904.07(b) (“Whether the Specimen Shows the Applied-For Mark Functioning as a Mark”), 1202.03 (“Refusal on Basis of Ornamentation”).

protection.¹⁴ It blocks trademark owners from suppressing legitimate competition by monopolizing a useful product feature and extending patent-like protection beyond the patent term of years.¹⁵ For example, a medical equipment producer cannot own a trademark for a particular color when during medical procedures it makes the product more visible.¹⁶

Courts view functionality as “a fact-specific conclusion about whether aspects of a design are ‘essential to the use or purpose of the article or . . . affect[] the cost or quality of the article.’”¹⁷ The doctrine may prevent companies from “appropriating basic forms . . . that go into many designs,” and it also insures that product designs or features covered by patents ultimately enter the public domain.¹⁸ Even if a particular shape is not the only possible shape for a product, it may still be functional if “it represents one of many solutions to a problem.”¹⁹ If a shape “enables a product to operate, or improves on a substitute design in some way (such as by making the product cheaper, faster, lighter, or stronger), then the design cannot be trademarked; it is functional because consumers would pay to have it rather than be indifferent toward or pay to avoid it.”²⁰

The Supreme Court has also emphasized that the claims in a utility patent can annihilate a claim of product shape trade dress protection. In *TraFFix*,²¹ the Court did not mince words. The

14. *E.g., In re Dietrich*, 91 U.S.P.Q.2d 1622 (T.T.A.B. 2009) (finding configuration mark of spoke pattern in bicycle wheel functional despite concession by examining attorney that mark had acquired distinctiveness, holding that “[t]he determination that a proposed mark is functional constitutes an absolute bar to registration’ regardless of the evidence of acquired distinctiveness”) (citation omitted).

15. See Gilson on Trademarks, *supra* note 7, § 2A.04, for more on functionality of trade dress.

16. See *Erbe Electromedizin GmbH v. Canady Tech. LLC*, 529 F. Supp. 2d 577 (W.D. Pa. 2007).

17. *Specialized Seating, Inc. v. Greenwich Indus., LP*, 616 F.3d 722, 726 (7th Cir. 2010), quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982).

18. *Id.* at 727.

19. *Id.* (holding that several alternative folding chair shapes may be functional “in the sense that they represent different compromises along the axes of weight, strength, kind of material, ease of setup, ability to connect (‘gang’) the chairs together for maximum seating density, and so on. A novel or distinctive selection of attributes on these many dimensions can be protected for a time by a utility patent or a design patent, but it cannot be protected forever as one producer’s trade dress. When the patent expires, other firms are free to copy the design to the last detail in order to increase competition and drive down the price that consumers pay”).

20. *Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 855, 857 (7th Cir. 2010).

21. *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001) (Mr. Gilson was co-counsel for *amicus* Panduit Corp., urging reversal).

plaintiff, owner of expired patents with claims that covered the same product features, nonetheless asserted trade dress rights in a dual-spring device designed to keep outdoor signs upright under severe wind conditions. The Court made it very clear that the patent claims established functionality, and thus did not need to address the question of whether secondary meaning had attached. It stated, bluntly: “The Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity.”²²

Where a product feature gives a competitive advantage not from a utilitarian function but an aesthetic appeal, the doctrine of aesthetic functionality may also block protection.²³ One court found the color blue on a water filtration system aesthetically functional, even though the color itself did not make the system cheaper to produce, better at filtering impurities or easier to use.²⁴ Venturing into the judicially unfamiliar world of beauty, the court found that blue is “the only color that is almost exclusively associated with water, and routinely blue is more specifically connected with water that is clear, pure, healthy, and beautiful.”

C. Problems of Proof of Confusion and Dilution

Owners of nontraditional marks also face major challenges in proving likelihood of confusion or dilution. Courts may well have difficulty comparing certain sensory marks, like texture, sound, or scent. Is a leathery surface confusingly similar to a thick cloth surface? Is the bark of one dog confusingly similar to that of another dog? Is a lavender scent confusingly similar to a cedar scent? Conducting consumer surveys will be most challenging, as will describing such marks with precision. And presenting proof could lead to logistical problems rarely, if ever, confronted by even experienced trial counsel. In the end, courts will probably be faced with conflicting expert testimony and unfamiliar evidence, in some cases based on scientific instruments. They just may devise their own touch, taste, or sniff tests *tabula rasa* for themselves or for juries.

A problem in some ways unique to nontraditionals is that of the juxtaposed traditional trademark, because it would be highly

22. *Id.* at 34.

23. See Gilson on Trademarks, *supra* note 7, § 2A.04[5].

24. Sun Water Sys., Inc. v. Vitasalus, Inc., 2007 U.S. Dist. LEXIS 14028 (N.D. Tex. 2007).

unusual, if not impossible, for a marketer to identify its products with *only* a nontraditional mark. A defendant will almost certainly use a nonconflicting traditional mark alongside the similar color or product shape, and proving likelihood of confusion would thus be very difficult. In one such case, though the plaintiff's color mark was presumed valid, a district court refused to grant a restraining order based on likely confusion.²⁵ Although plaintiff owned a federal registration for the color blue for portable ice fishing structures,²⁶ defendant's used different shades of blue, had black tops, and featured a nonconflicting word mark in "large, easily legible lettering."²⁷

Proving a likelihood of dilution for an allegedly famous nontraditional mark poses an even more daunting assignment, because federal law sets the fame threshold very high: "A mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner."²⁸ As applied to a texture or a scent mark, this requirement would be extremely difficult to overcome, but a sound mark with nationwide broadcast exposure would stand a better chance. Famous marks with either inherent or acquired distinctiveness may theoretically be entitled to injunctive relief,²⁹ but marks that cannot be inherently distinctive—color, scent, product shape, some sound marks, and probably flavor—may not even have their parachutes open. And because dilution by blurring would require impairment of the distinctiveness of a famous but basically nondistinctive nontraditional, proof will require a daredevil's mindset. Similarly, while proving tarnishment of, say, a color, scent, or flavor mark is hypothetically possible, one may well encounter the credible defense of the juxtaposed traditional trademark.

25. *Clam Corp. v. Innovative Outdoor Solutions, Inc.*, 89 U.S.P.Q.2d 1314 (D. Minn. 2008).

26. *See* U.S. Reg. No. 3025241 (color blue for fabric-covered portable ice fishing shelters).

27. The court also found that the defendant did not intend to copy plaintiff's mark, that consumers would exercise a high degree of care in purchasing the shelters, and that there was no evidence of actual confusion.

28. 15 U.S.C. § 1125(c)(2)(A). *See also* Gilson on Trademarks, *supra* note 7, § 5A.01[4][a].

29. 15 U.S.C. § 1125(c)(1).

III. UPDATE ON DIFFERENT TYPES OF NONTRADITIONAL MARKS

In this section we present an abbreviated update on some of the latest registrations of and decisions regarding nontraditional marks in various categories. The record indicates that, in the exotic world of the nontraditional and beyond, with goats up there on the roof, when it comes to registering such marks the United States Patent and Trademark Office (USPTO) is your friend.

A. Product Packaging Trade Dress

Three-dimensional product packaging can serve as a source indicator if it is distinctive and not functional.³⁰ In the United States, several product packaging marks are registered with the USPTO. Some incorporate other marks or brand names, and some do not. For example, the following is registered in color for pastries, cakes and sweets:³¹



The following is the three-dimensional form of a cigarette box registered as packaging for clothing:³²



30. For more on product packaging marks, see Gilson on Trademarks, *supra* note 7, §2.11[8][b], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 811-13.

31. U.S. Reg. No. 3635466.

32. U.S. Reg. No. 3326573.

And the following container, complete with brand name, is registered in color for plant food:³³



The courts have supported product packaging trademarks as well. One federal district court found that a red dripping wax seal atop a whiskey bottle was a valid trademark for whiskey, enjoining another company from using red dripping wax atop tequila bottles.³⁴ Another found the packaging of a Hershey chocolate bar to have secondary meaning and to be nonfunctional.³⁵ It granted a temporary restraining order on infringement and dilution grounds against a furniture retailer seeking to use the image of a brown couch emerging from a wrapper that evoked the familiar and famous Hershey bar.

In a world of constant package redesign, one might hesitate to pursue registration and instead rely on unregistered trade dress protection. Registration entails a certain trademark rigidity, and altering the package risks abandoning the mark. In a competitive packaging marketplace, this alternative would also avoid potential problems in seeking registration.

33. U.S. Reg. No. 3250568.

34. *Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671 (W.D. Ky. 2010). *See* U.S. Reg. No. 2690813.

35. *Hershey Co. v. Art Van Furniture, Inc.*, 2008 U.S. Dist. LEXIS 87509 (E.D. Mich. 2008). *See also, e.g.*, *Lance Mfg. LLC v. Voortman Cookies Ltd.*, 617 F. Supp. 2d 424 (W.D.N.C. 2009) (at preliminary injunction stage, plaintiff likely to show that its cookie packaging is distinctive).

B. Product Shape Trade Dress

Sometimes called product designs,³⁶ product shapes may serve as trademarks for the products themselves, as well as for other goods or services.³⁷ To be protectable, however, a shape must be distinctive and nonfunctional.³⁸ As the Supreme Court points out, product shapes face the obstacle of never being inherently distinctive as source indicators.³⁹ However, when the Court spun out its rationale, it bit off more than it could chew.

Confusing everyone, the Court chose an Art Deco classic, the penguin-shaped cocktail shaker, as the paradigm of a unique product shape that consumers never—well, almost never—would associate with source. It did so with no warning, judicial notice, or the benefit of informed argument, generalizing about the motivations of “consumers” it never identified. Astonishingly, the penguin was never mentioned in the parties’ presentations, either in the briefs or in argument before the Court.⁴⁰

Perhaps unaware of the rich history of the penguin, the Court scoffed at the notion that its distinctive shape could function as a trademark: “Consumers are aware of the reality that, *almost invariably, even the most unusual of product designs—such as a cocktail shaker shaped like a penguin—is intended not to identify the source, but to render the product itself more useful or more appealing.*”⁴¹ Here it is:

36. We use the phrase “product shape” rather than “product design” to avoid ambiguity. The term “design” could refer to a sketch, blueprint, or concept for a product, while the term “shape” better captures this type of trade dress.

37. For more on product shape marks, see Gilson on Trademarks, *supra* note 7, § 2.11[8][a], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 809-11. See also Amy B. Cohen, *Following the Direction of Traffix: Trade Dress Law and Functionality Revisited*, 50 IDEA 593 (2010); Karen Feisthamel et al., *Trade Dress 101: Best Practices for the Registration of Product Configuration Trade Dress with the USPTO*, 95 TMR 1374 (2005).

38. See, e.g., *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 627 (7th Cir. 2010) (“A distinctive design may be protected as a trademark only if it has acquired secondary meaning—that is, if consumers associate the design with a particular manufacturer—and the design’s identifying aspects are not functional.”).

39. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212 (2000).

40. Theodore H. Davis, Jr., a partner in the Atlanta firm Kilpatrick Townsend & Stockton LLP and author of the *Annual Review of Administration of the U.S. Trademark (Lanham) Act of 1946*, was lead counsel on the International Trademark Association *amicus* brief in the *Wal-Mart* case in the Supreme Court. He recalls being baffled by the reference to the penguin shaker in the Court’s opinion. Later he retrieved the oral argument transcript and the parties’ and the amici’s briefs, and searched for the word “penguin.” He found no mention of it.

41. *Wal-Mart Stores*, 529 U.S. at 213 (emphasis added).



Cocktail shakers had their heyday in the years after Prohibition was repealed in 1933.⁴² Featured in movies with glamorous stars sipping martinis, they became the ultimate in sophistication. A number became legendary, collectible Art Deco pieces, with shapes ranging from skyscrapers, roosters, bowling pins, golf bags, airplanes, and dumbbells, to even a lady's leg.⁴³

One of the era's standouts that survives to this day is the penguin cocktail shaker. Emil A. Schuelke, of Meriden, Connecticut, designed it in the mid-1930s for Napier Company, also of Meriden. He obtained a design patent on it,⁴⁴ and Hammacher Schlemmer launched it nationally with an advertisement in *The New Yorker* of September 19, 1936. It came on the market during the golden age of the cocktail shaker and probably did well. Nevertheless, shaker producers converted to the war effort in 1941, and production plummeted.⁴⁵

Today the penguin cocktail shaker is a "beloved symbol of the best of all periods for the cocktail shaker. . . . By a common verdict, the most generally beloved of novelty shakers is the Penguin,

42. The ultimate authority is Simon Khachadourian, *The Cocktail Shaker, The Tanqueray® Guide* (2000).

43. *The Webtender: The History of the Cocktail Shaker*, <http://www.webtender.com/handbook/shaker.html>.

44. U.S. Des. Pat. 101,559 (Oct. 13, 1936).

45. <http://artdecoblog.blogspot.com/2006/04/emil-schuelke-penguin-cocktail-shaker.html>.

designed by E. A. Schuelke. . . .”⁴⁶ It is prized by Art Deco collectors, and vintage specimens have sold at retail.⁴⁷ One has reportedly sold at auction for \$6,600⁴⁸ and they have been offered for \$500⁴⁹ and \$415.⁵⁰ Restoration Hardware has produced imitations,⁵¹ and possibly they and definitely others continue to sell on the Internet today for under \$40.⁵²

Purchasers of vintage penguin shakers today are probably well-to-do, knowledgeable antique collectors. The prices they pay suggest they are aware that the shape represents Schuelke/Napier or a corresponding anonymous source, and perhaps purchasers among the general public do as well. In any event, the Court’s opinion cited to no evidence whatever as to consumer awareness. The Supreme Court not only chose an entertaining example, it engaged in rank speculation.

Only a full-scale court action with discovery, consumer survey evidence, a trial on the merits, and an adjudication could possibly establish the contours of the shaker-consuming public, its demographics (such as education, income and knowledgeability), and its buying habits. While the underlying principle in the quotation is sound, neither the penguin shaker nor any other made-up example can support it.

Moving from the Art Deco–inspired, cocktail-infused world to the hard realities of protecting product shapes, functionality often stands in the way when a business asserts a product shape mark. Indeed, in a spate of recent decisions, it has become the cornerstone of denying protection.⁵³ And there is no group of cases holding to the contrary.

46. Khachadourian, *supra* note 42, at 103, 109.

47. Barnaby Conrad III, *Movers and Shakers*, *ForbesLife*, June 19, 2006, at 63-64.

48. *Id.* at 63.

49. <http://www.atlantaantiquegallery.com/i-4940140-vintage-penguin-cocktail-shaker.html>.

50. <http://www.thejazzage.com/items.asp?grp=6&R=1>.

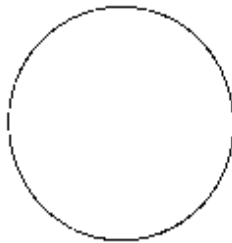
51. <http://www.visakay.com/5901.html>. Restoration Hardware’s founder and CEO, Stephen Gordon, according to a magazine interview, was captivated by the penguin in a display of vintage shakers at San Francisco International Airport. He immediately called his in-house design team, and a few months later in its 1998 holiday catalogue Restoration Hardware launched a penguin shaker. *See* http://multichannelmerchant.com/printchannel/lists/marketing_restoration_hardware_holiday/.

52. *E.g.*, <http://www.amazon.com/Pete-the-Penguin-Cocktail-Shaker/dp/B001F5FWD4> (\$30.23 new, \$25.99 used).

53. *E.g.*, *Fuji Kogyo Co. v. Pacific Bay Int’l, Inc.*, 461 F.3d 675 (6th Cir. 2006) (finding fishing line guide trade dress functional as stronger and cheaper to manufacture than other alternatives; trade dress had been the subject of both utility and design patents), *cert. denied*, 549 U.S. 1252 (2007); *Secalt S.A. v. Wuxi Shenxi Construction Machinery Co.*, 2010

The courts have often recognized that functionality is specifically listed as one of the “defenses or defects” in Section 33 of the Lanham Act that can derail incontestability rights. If the right to use a registered mark has become incontestable, the registration is conclusive evidence of the exclusive right to use the mark in commerce, subject to functionality and the other listed defenses and defects. Otherwise, the registration is bulletproof.⁵⁴

Take the intriguing case of the circular beach towel: In 1988, the USPTO registered the configuration of a round beach towel in the actual format below as a trademark for beach towels:⁵⁵



In 2006, once the registration was incontestable, a competing manufacturer of round beach towels sued to invalidate the registration. Although the registration could not be challenged on distinctiveness grounds, the court found the so-called mark functional. The defendant had made it clear to lazy sun-worshippers that their tanning problems were over: “The round shape eliminates the need to constantly get up and move your towel as the sun moves across the sky. Instead merely reposition yourself.” Nevertheless, the Seventh Circuit concluded that the

U.S. Dist. LEXIS 85009 (D. Nev. 2010) (finding construction hoist functional); *Great Neck Saw Mfrs., Inc. v. Star Asia U.S.A., LLC*, 2010 U.S. Dist. LEXIS 75057 (W.D. Wash. 2010) (finding folding knife functional); *Dixie Consumer Prods. LLC v. Huhtamaki Americas, Inc.*, 691 F. Supp. 2d 1372 (N.D. Ga. 2010) (finding narrow white band on bottom of insulated cup to be functional); *Minemyer v. B-Roc Reps., Inc.*, 678 F. Supp. 2d 691 (N.D. Ill. 2009) (plaintiff admitted that each feature of his plastic pipe couplers, including their color, is functional, and nothing about combination of elements changed determination of functionality; trade dress also found functional despite existence of alternative shapes).

But see *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405 (6th Cir. 2006) (trade dress of Hummer vehicle nonfunctional; trade dress was defined as “the exterior appearance and styling of the vehicle design which includes the grille, slanted and raised hood, split windshield, rectangular doors, squared edges, etc.”), *cert. denied*, 552 U.S. 819 (2007); *Miche Bag LLC v. Marshall Grp.*, 2010 U.S. Dist. LEXIS 59900 (N.D. Ind. 2010) (finding handbag trade dress nonfunctional due to availability of alternative designs).

54. 15 U.S.C. § 1115(b)(8).

55. U.S. Reg. No. 1502261.

shape was not “essential to the use or purpose of the device,” that it affected its quality, and was visually appealing and thus aesthetically functional.⁵⁶

The same court reached the same result the same day, finding another incontestable registration invalid, this time in a case involving a folding chair product shape trademark.⁵⁷ The USPTO had registered the following mark for chairs in 2004:⁵⁸



The court found the chair functional despite a list of possible alternative designs. While the chair mark represented one of many solutions to a problem, each of the alternatives could be considered functional. Although a unique collection of folding chair features could be protected under plaintiff’s patent for a limited time, under *TrafFix* when the patent expired, trade dress law could not prevent others from copying the functional shape.

In addition to functionality, distinctiveness is also an issue hindering product shape protection. Showing that consumers see a product shape itself as a trademark for the underlying product is particularly difficult.⁵⁹

56. *Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 855, 857-61 (7th Cir. 2010).

57. *Specialized Seating, Inc. v. Greenwich Indus., LP*, 616 F.3d 722 (7th Cir. 2010).

58. U.S. Reg. No. 2803875 (cancelled).

59. *E.g.*, *Express, LLC v. Forever 21, Inc.*, 2010 U.S. Dist. LEXIS 91705 (C.D. Cal. 2010) (jacket lacked secondary meaning); *Gennie Shifter, LLC v. Lokar, Inc.*, 2010 U.S. Dist. LEXIS 2176 (D. Colo. 2010) (automobile part that attaches shifter knobs lacked secondary meaning).

But see *Miche Bag LLC*, 2010 U.S. Dist. LEXIS 59900 (finding handbag had secondary meaning from evidence of extensive sales, proof of intentional copying, amount of advertising).

Product shape cases know no bounds, so it should come as no surprise that, in trade dress litigation, the shapes are sometimes edible. In a case that, to the disappointment of many, settled before a written decision, one cupcake store sued another cupcake store in federal district court in Utah for trade dress infringement.⁶⁰ The plaintiff claimed that the defendant's "Tiffany Jewels" cupcakes were confusingly similar to plaintiff's "Breakfast at Tiffany's" cupcakes. Why, it might be asked, did each party refer by name to a posh retailer of luxury goods? Clearly, it was the blue cream cheese frosting and edible silver and white jewel sprinkles. Another edibles case that also settled involved a trade dress infringement claim that the overall appearance of the defendant's pizza imitated that of plaintiff's.⁶¹ This case resulted in a consent judgment.

C. Sound Trademarks

Sound marks can be effective and memorable,⁶² but surprisingly, there are fewer than 155 currently registered on the United States Principal Register. Most are solely music,⁶³ some are animal noises,⁶⁴ and others are verbal, spoken words⁶⁵ or human

60. *Mini's Cupcakes, Inc. v. LuAnn's Cupcakes, Inc.*, No. 10-CV-457 (D. Utah, filed May 14, 2010, terminated June 16, 2010).

61. *Papa John's Int'l v. Pizza Magia Int'l*, 00-cv-00548-JGH (W.D. Ky., filed Sept. 12, 2000, terminated Jan. 23, 2007).

See Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?* 9 J. High Tech. L. 21 (2009).

62. For more on sound marks, see Gilson on Trademarks, *supra* note 7, § 2.11[6], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 801-06. See also Julia Anne Matheson & Ana S. Balichina, *If It Quacks Like a Duck . . . It Just Might Be a Trademark*, ABA *Landslide*, p. 42 (July/Aug. 2010); Nick Pisarsky, Note, *PoTAYto-PoTAHto—Let's Call the Whole Thing Off: Trademark Protection of Product Sounds*, 40 Conn. L. Rev. 797 (2008); Kevin K. McCormick, "Ding" You Are Now Free to Register That Sound, 96 TMR 1101 (2006).

63. See, e.g., U.S. Reg. Nos. 3288274 (computer software); 3302754 (insurance services); 3348747 (banking and financial services); 3841500 (entertainment services); 3659390 (computer hardware); 3219900 (children's books); 3141398 (television and radio programs featuring sports); 3034331 (restaurant services); 3792270 (teleconferencing and video conferencing services).

64. See, e.g., U.S. Reg. Nos. 3502115 ("an eagle sound, in specific, its particular squeal" for beer); 3406550 ("the sound of an amphibian, such as a frog, croaking or otherwise verbalizing the word 'CREBIT,' for credit and debit card services); 3020512 (the sound of a wild cat growling for insurance brokerage and administration services); 2827972 ("a series of five chirps similar to the chirping sound of a cricket" for software for notification of weather conditions); 2600195 ("sound of a wild loon provided in one or more short bursts" for lottery services); 2158156 (a cat's meow, for films); 1395550 (a lion roaring, for motion pictures and related services).

voices singing or making various noises.⁶⁶ Percussive sounds are always popular. Consider “a rhythmic drum beat punctuated by a bar code scan beep,”⁶⁷ a hand knocking on a door twice,⁶⁸ “one clap followed in turn by one stomp, and then one clap followed in turn by one stomp, ending with one clap with a swoosh sound.”⁶⁹ But perhaps the most bizarre sound mark registered in the United States is “the sound of burning methamphetamine[, beginning with] the flick of a lighter, followed by a fizzing sound of a small flame ignition, and high pitched metallic crackling sounds.”⁷⁰ Really? Actually, it becomes understandable, as it covers “preparing and disseminating public service advertising material related to the prevention of methamphetamine abuse for others.”

Since our last article, the TTAB has decided two sound mark cases, refusing registration in each. The first rejected mark was “a descending frequency sound pulse” for a “personal security alarm in the nature of a child’s bracelet to deter and prevent child abductions.”⁷¹ The TTAB found a lack of inherent distinctiveness because the goods make the sound in their everyday function. It also held that consumers would see it not as a source indicator but as alerting to the emergency prompting the alarm. Lastly, the TTAB held that it was functional as “essential to the use or purpose of applicant’s products.” The second was the “chirp” case, involving “an electronic chirp consisting of a tone at 1800 Hz played at a cadence of 24 milliseconds ON, 24 ms OFF, 24 ms ON, 24 ms OFF, 48 ms ON,” for cell phones and two-way radios.⁷² Because the goods make several noises in their normal operation

65. See, e.g., U.S. Reg. Nos. 3745854 (“a man saying ‘Cheap Cheap Cheap’ in a high-pitched voice” for car dealerships); 3461451 (the spoken words “WOO HOO!” for lottery services); 3411881 (the spoken word “D’OH” for “Entertainment services in the nature of an animated television series”); 3369778 (“a human voice speaking ‘HELLO AND WELCOME TO MOVIEFONE’” for telephone movie directory services); 2821863 (the spoken words YOU’VE GOT MAIL for multiple user access to computer networks and other services); 2566667 (the spoken letters “B,” “E,” “T” for cable television broadcasting services); 1761724 (spoken letters “AT & T” for long distance telecommunications services).

66. See, e.g., U.S. Reg. Nos. 3841800, 2210506 (the famous Tarzan yell for slot machines and toy action figures); 3618322 (“the sound of rhythmic mechanical human breathing created by breathing through a scuba tank regulator” for costumes incorporating masks) (registration owned by Lucas film, presumably the sound of Darth Vader’s labored breathing); 2442140 (a human voice yodeling “YAHOO” for online computer services).

67. U.S. Reg. No. 3387559 (grocery store services).

68. U.S. Reg. No. 3431995 (providing information about hotel rates).

69. U.S. Reg. No. 3507782 (for television programming).

70. U.S. Reg. No. 3582216.

71. *In re Vertex Grp. LLC*, 89 U.S.P.Q.2d 1694 (T.T.A.B. 2009).

72. *Nextel Comm’ns, Inc. v. Motorola, Inc.*, 91 U.S.P.Q.2d 1393 (T.T.A.B. 2009).

and the respondent failed to prove acquired distinctiveness, the TTAB also found the chirp to lack inherent distinctiveness.

D. Color Trademarks

Color trademarks—those that consist solely of one color or, rarely, more than one color—got a substantial boost from the Supreme Court in 1995 in the *Qualitex* case: “[O]ver time, customers may come to treat a particular color on a product or its packaging . . . as signifying a brand.”⁷³ Nevertheless, comparatively few color marks are registered, and enforcing them has proved difficult.

Color marks still have some niche popularity, but there are few registrations to be found outside of certain industries.⁷⁴ The majority of color registrations in the United States are for mechanical devices or products related to the construction industry,⁷⁵ with some in medical products,⁷⁶ and others covering consumer services.⁷⁷ The others are an odd mixed bag, with no discernible pattern: the color pink for live petunia plants,⁷⁸ purple for brownies,⁷⁹ black for canned crab meat,⁸⁰ blue for beer,⁸¹ and

73. *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163 (1995).

74. For more on color marks, see Gilson on Trademarks, *supra* note 7, § 2.11[2], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 777-95. See also Sunila Sreepada, Note, *The New Black: Trademark Protection for Color Marks in the Fashion Industry*, 15 *Fordham Intell. Prop. Media & Ent. L.J.* 1131 (2009).

75. *E.g.*, U.S. Reg. Nos. 3587281 (color yellow on the sides and bottom of box; goods are parts for on- and off-road vehicles); 3348719 (color purple applied to entire surface of rubber caps and plugs); 3480730 (color green applied to edges of structural building insulation panels); 3587138 (color blue applied to power distribution connectors); 3512559 (color blue applied to air filters); 3458083 (color orange applied to electronic automotive diagnostic equipment); 3356104 (color beige for fork lift trucks; applied to portion directly below the seat of the truck); 3422922 (color canary yellow for construction materials sold in bulk; applied to the vehicles used to deliver the goods); 3255096 (color blue for machine parts); 3075790 (gold for metal cable choker slides for logging).

76. *E.g.*, U.S. Reg. Nos. 3351976 (color blue for cushions used to hold dental instruments during procedures); 3008496 (color red for medical needles; applied to middle of needle); 3099894 (color purple for disposable nitrile gloves); 3748055 (blue and white tablet, cough expectorants).

77. *E.g.*, U.S. Reg. Nos. 3429643 (color orange as applied to clothing worn during performance of services, for roofing services); 3339367 (color green applied to surface of vehicles used in performing pest control services); 3421388 (red applied to surface of vehicles, for troubleshooting of computer problems).

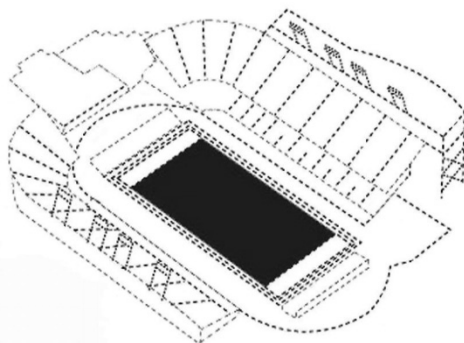
78. U.S. Reg. No. 3666774 (color applied to packaging for plants).

79. U.S. Reg. No. 3110845 (color applied to packaging and displays).

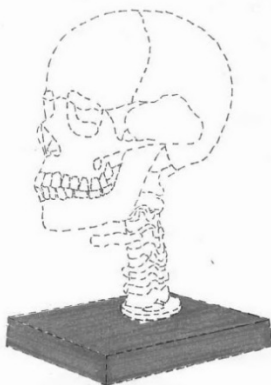
80. U.S. Reg. No. 3629229 (color applied to packaging).

81. U.S. Reg. No. 3037003 (color applied to the tab on the aluminum cans containing the goods).

yellow for plastic baseball bats.⁸² Boise State University ingeniously registered the color blue for “the presentation of intercollegiate sporting events and sports exhibitions rendered in a stadium, and through the media of radio and television broadcasts and the global communications network.” The color covers the stadium’s artificial turf.⁸³



A German producer of educational models owns a United States registration for a somewhat macabre mark consisting of the color green for “[a]natomical, zoo-logical and botanical models as instructional and teaching material”; the color is applied to the base and stand of the models.⁸⁴



82. U.S. Reg. No. 3579003 (color applied to surface of goods).

83. U.S. Reg. No. 3707623.

84. U.S. Reg. No. 3790316.

As a whole, however, federal courts have recently been unreceptive to color marks. Over the past several years, they have often found color marks functional⁸⁵ or that they lack the requisite secondary meaning.⁸⁶ In one case a television network claimed that its “visual system” was protectable. Its advertising was “comprised of a particular color palette (distinctive shades of orange, green, and cyan blue) and design (‘soft’ and ‘whimsical’ geometric shapes as mortise or framing devices).”⁸⁷ However, the court found it to be aesthetically functional as appealing to children, the target market. The TTAB, too, has rejected applications for registration of color marks on distinctiveness⁸⁸ and functionality⁸⁹ grounds.

85. See *University of Alabama Bd. of Trs. v. New Life Art, Inc.*, 677 F. Supp. 2d 1238, 1249 (N.D. Ala. 2009) (“Football uniform colors clearly perform a function. They help avoid confusion as to team members for the benefit of officials, opposing team members and spectators.”); *Ruiz Food Prods. v. Camino Real Foods, Inc.*, 2009 U.S. Dist. LEXIS 105941 (E.D. Cal. 2009) (“Use of color to represent flavor must be considered functional.”); *Minemyer v. B-Roc Repts., Inc.*, 678 F. Supp. 2d 691, 699 (N.D. Ill. 2009) (colors denoting the size of plastic pipe couplers serve a functional purpose); *Sharn, Inc. v. Wolfe Tory Medical, Inc.*, 2009 U.S. Dist. LEXIS 97385 (M.D. Fla. 2009) (finding that color white on the cone of a medical device is functional because it is a common color for that feature in the field); *Erbe Electromedizin GmbH*, 529 F. Supp. 2d 577 (W.D. Pa. 2007) (finding that the color blue for flexible endoscopic probes is functional because it causes the product to be clearly visible during medical procedures; holding that the fact that other colors would also be visible did not mean that blue was nonfunctional); *Sun Water Sys., Inc. v. Vitasalus, Inc.*, 2007 U.S. Dist. LEXIS 14028 (N.D. Tex. 2007) (finding color blue to be aesthetically functional for a water-filtration system).

Compare Johnson & Johnson v. Actavis Grp. hf., 87 U.S.P.Q.2d 1125 (S.D.N.Y. 2008) (gold color on packaging for antibiotic cream found not aesthetically functional because its exclusive use by one producer would not hinder competition); *Rotoworks Int’l Ltd. v. Grassworks USA, LLC*, 504 F. Supp. 2d 453 (W.D. Ark. 2007) (aqua color on agricultural implements is nonfunctional, though it may be slightly less expensive than other colors).

86. *Predator Int’l, Inc. v. Gamo Outdoor USA, Inc.*, 669 F. Supp. 2d 1235 (D. Colo. 2009) (finding insufficient secondary meaning of color red on tip of air gun pellets); *MSP Corp. v. Westech Instruments, Inc.*, 500 F. Supp. 2d 1198 (D. Minn. 2007) (plaintiff unlikely to be able to show secondary meaning for royal blue for its impactor, used to test inhalers for medication).

87. *Jumpitz Corp. v. Viacom Int’l, Inc.*, 2010 U.S. Dist. LEXIS 84042 (S.D. Cal. 2010).

88. *In re General Techs., Inc.*, 2009 TTAB LEXIS 514 (T.T.A.B. 2009) (not citable as precedent) (evidence of acquired distinctiveness of color mark insufficient to permit registration; finding “nothing of record that shows that the alleged mark is being promoted as a source indicator”); *H & H Indus. v. LTG, Ltd.*, 2008 TTAB LEXIS 506 (T.T.A.B. 2008) (not citable as precedent) (finding that the respondent failed to meet “the heavy burden in demonstrating the distinctiveness of color marks”); *In re Elevator Safety Co.*, 2007 TTAB LEXIS 502 (T.T.A.B. 2007) (not citable as precedent) (finding insufficient evidence of acquired distinctiveness for color mark; mark not promoted as a source indicator); *Saint-Gobain Corp. v. 3M Co.*, 90 U.S.P.Q.2d 1425 (T.T.A.B. 2007) (insufficient evidence of acquired distinctiveness for color purple for sandpaper; applicant failed to overcome difficult burden, seeking registration of a color mark in a field where colored products are common).

89. *Saint-Gobain Corp.*, 90 U.S.P.Q.2d at 1425 (upholding opposition to color purple for sandpaper due to functionality; “What is unusual about this case is that the manufacturing

Similarly, the European Union General Court denied registration of two color marks as Community Trade Marks (CTMs) in 2010 on the ground that they lacked distinctiveness: the color black and the color gold, each in a matte texture covering a wine bottle.⁹⁰ The court found that the marks were not significantly different from the surfaces typically used in the wine industry, and that consumers identify source from not only the bottle surface but also from the word or logo marks.

But all has not been bleak for color marks. Just last year a federal district court in Wisconsin granted a preliminary injunction enforcing the color red for knobs used on ranges, cooktops, and barbeque grills.⁹¹ The defendant failed to overcome the secondary meaning implicit in plaintiff's registration,⁹² and because the respective red knobs had "a similar shape, size and color" the plaintiff was likely to succeed on the merits. Another plaintiff survived a motion to dismiss, contending that the color pink was functional for nitrile medical gloves because it also sold such gloves in blue, suggesting that pink was not essential to the use or purpose of the gloves.⁹³ The court was skeptical, however, noting that the plaintiff had "just barely 'nudg[ed] [its] claims across the line from conceivable to plausible.'" In addition, in an unpublished opinion, the Ninth Circuit upheld a jury finding that the defendant had willfully infringed Wham-O's trademark in the color yellow on its Slip 'n Slide toys.⁹⁴

University colors have also been the subject of recent litigation. In a questionable color mark case, one district court found that a university's school colors alone were protectable and

process of coated abrasives . . . results in products with numerous colors."); *In re Armament Systems and Procedures, Inc.*, 2005 TTAB LEXIS 384 (T.T.A.B. 2005) (not citable as precedent) (upholding final refusal of registration on Supplemental Register on functionality grounds for color red for law enforcement training equipment).

90. *Freixenet, SA v. OHIM*, Case No. T-110/08 (2010); *Freixenet, SA v. OHIM*, Case No. T-109/08 (2010).

91. *Wolf Appliance, Inc. v. Viking Range Corp.*, 686 F. Supp. 2d 878 (W.D. Wisc. 2010). *See also Rotoworks Int'l Ltd.*, 504 F. Supp. 2d 453 (W.D. Ark. 2007) (granting motion for preliminary injunction and finding that the color aqua on certain farm equipment had secondary meaning and was nonfunctional).

92. U.S. Reg. No. 3485025.

93. *Colour World, LLC v. Smarthealth, Inc.*, 93 U.S.P.Q.2d 1690 (E.D. Pa. 2010).

94. *SLB Toys USA, Inc. v. Wham-O, Inc.*, 330 Fed. Appx. 634 (9th Cir. 2009) (unpublished) (agreeing that Wham-O had met its burden of showing nonfunctionality of the color and upholding award of attorneys' fees as an extraordinary case). *See* U.S. Reg. No. 2924744 (for toy water slides, "[t]he mark consists of the color yellow applied to the entire horizontal surface of water slides and the color blue applied to the entire surface of the bumpers for the water slides").

enforceable.⁹⁵ The result seemed foreordained, as the court granted summary judgment on infringement and dilution grounds over the sale of unlicensed apparel. It found that a scarlet and black color scheme was not functional and had secondary meaning, because “products which are sold in Lubbock, Texas, that bear the scarlet and black color scheme have become associated with a specific source—Texas Tech.”⁹⁶ However, none of the defendant’s products had only the scarlet and black colors with no other indicia, so the court did not prohibit the use of those colors entirely. The Fifth Circuit encountered a similar situation, but the plaintiff universities did not go so far as to claim “that every instance in which their team colors appear violates their respective trademarks.”⁹⁷ Instead, they claimed trademark rights in the colors appearing *in addition to* other indicia, such as allusions to the schools’ athletic events and championships.⁹⁸ There, the defendant was found liable for trademark infringement and was enjoined from selling any more infringing apparel.

E. Scent Trademarks

Scent trademark registrations are few and far between,⁹⁹ and there have been no reported United States cases on scent marks since our prior article.

In the United States, there are two pending scent mark applications, one for a peppermint scent for medical nitroglycerin¹⁰⁰ and the other for a coconut scent for retail stores selling sandals, beach balls, Frisbees, and other products.¹⁰¹ Only one scent mark is registered on the United States Principal Register. It is “a cherry scent” designed to replace noxious fumes at the racetrack and is registered for “synthetic lubricants for high

95. *Texas Tech Univ. v. Spiegelberg*, 461 F. Supp. 2d 510 (N.D. Tex. 2006).

96. *Id.* at 520.

97. *Bd. of Supervisors of La. State Univ. v. Smack Apparel Co.*, 550 F.3d 465, 475 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2759 (2009).

98. *See also Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 677 F. Supp. 2d 1238, 1240 (N.D. Ala. 2009) (finding “highly questionable” the assertion that a university’s color scheme is protectable “in any context and is not limited to the use of colors only when used with another University mark”).

99. For more on scent marks, see Gilson on Trademarks, *supra* note 7, § 2.11[3], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 795-800.

100. U.S. Ser. No. 85008626 (filed Apr. 7, 2010).

101. U.S. Ser. No. 85063625 (filed June 15, 2010).

performance racing and recreational vehicles.”¹⁰² The Supplemental Register goes farther and includes registrations for the scent of rose oil for advertising and marketing;¹⁰³ strawberry for toothbrushes;¹⁰⁴ and “a minty scent by mixture of highly concentrated methyl salicylate . . . and menthol” for medicated transdermal patches for pain relief.¹⁰⁵ The prize, however, goes to the scents of apple cider, peppermint, vanilla, peach, lavender, and grapefruit for hanging file folders.¹⁰⁶

Outside the United States, scent marks have had something of a heyday. On the positive side, for example, registrations have been granted for a eucalyptus scent for golf tees,¹⁰⁷ a fresh-cut grass scent for tennis balls (registration expired),¹⁰⁸ a floral fragrance “reminiscent of roses” for vehicle tires,¹⁰⁹ “the strong smell of bitter beer” applied to flights for darts,¹¹⁰ and different fruit fragrances for containers.¹¹¹

On the other hand, in 2005 the European Court of Justice refused registration for the “smell of ripe strawberries” for leather wallets, purses, bags, harnesses, clothing, and shoes.¹¹² It did so in part because different strawberry varieties can have a different smell, making it impossible to identify the mark precisely. OHIM (the Office for Harmonisation of the Internal Market) refused registration for the scent of lemon applied to the soles of shoes¹¹³ and the scent of vanilla for various products, including soaps, jewelry, clothing, hair accessories and paper.¹¹⁴ And the U.K.

102. U.S. Reg. No. 2463044. The same registrant also owns registrations on the Supplemental Register for “lubricants and motor fuels for land vehicles, aircraft, and watercraft” for both a strawberry and a grape scent. U.S. Reg. Nos. 2596156 (strawberry) and 2568512 (grape).

103. U.S. Reg. No. 3849102.

104. U.S. Reg. No. 3332910.

105. U.S. Reg. No. 3589348.

106. U.S. Reg. Nos. 3140701 (apple cider); 3140700 (peppermint); 3143735 (vanilla); 3140694 (peach); 3140693 (lavender); 3140692 (grapefruit).

107. Australian Reg. No. 1241420 (Aug. 11, 2008) (*see* <http://www.aromatee.com.au/index.html>).

108. CTM Reg. No. 000428870 (registered Dec. 12, 2001, expired Oct. 14, 2007).

109. U.K. Reg. No. 2001416 (registered Apr. 9, 1996).

110. U.K. Reg. No. 2000234 (registered May 3, 1996).

111. Argentine Reg. Nos. 2.270.653/54/55/56 to 2.270.657 (Jan. 2009).

112. *Eden SARL v. OHIM*, CFI T-305/04 (Oct. 27, 2005).

113. CTM App. No. 001254861 (filed Sept. 10, 1999, refused May 10, 2006).

114. CTM App. No. 001807353 (filed Aug. 14, 2000, refused Aug. 19, 2003).

trademark office refused registration for “the smell, aroma or essence of cinnamon” for furniture.¹¹⁵

F. Tactile Trademarks

The world of tactile trademarks moves even more slowly than that of scent marks.¹¹⁶ We have found no reported cases in the United States involving tactile trademarks since our last article. In the United States, there are only two registrations for purely tactile marks, with different owners but covering the same goods: on the USPTO’s Principal Register are registrations for a velvet texture¹¹⁷ and a leather texture,¹¹⁸ both for wine and both appearing on the surface of a wine bottle. One company has applied to register the following entirely tactile mark for nitroglycerin: “The mark consists of the distinctive touch and feel of a glass pump spray bottle with a plasticized surface. The pump spray bottle has a smooth surface with a weightiness, thickness and durability imparted by the glass; simultaneously the bottle has a lightness and rubber-like quality imparted by the plasticized coating.”¹¹⁹

Texture may also be part of the description of a mark. For example, a three-dimensional perfume dispenser shaped like a basketball is registered on the Principal Register for perfume, and one of the components of the mark is its “pebble-grain” texture.¹²⁰ In addition, a bottle configuration is registered on the Principal Register for tequila, and the “texture of the neck and body of the bottle has a three-dimensional rippling.”¹²¹

115. U.K. App. No. 2000169 (filed Oct. 31, 1994, refused Feb. 27, 2001).

116. For more on tactile marks, see Gilson on Trademarks, *supra* note 7, § 2.11[5], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 801. See also Resolution on Protectability of Touch Marks by INTA Board of Directors, Nov. 8, 2006 (“BE IT RESOLVED, that it is the position of the International Trademark Association that a properly defined touch characteristic that is distinctive in relation to a product or service may function as a trademark or service mark and, therefore, in appropriate circumstances, should be entitled to trademark recognition, protection and registration.”); Christina S. Monteiro, *A Nontraditional Per-Spectrum: The Touch of Trademarks*, 65 INTA Bulletin No. 11 (2010).

117. U.S. Reg. No. 3155702.

118. U.S. Reg. No. 3896100.

119. U.S. Ser. No. 85007641 (filed Apr. 6, 2010). There is no drawing provided in the application for this sensory mark; instead, the applicant notes that “the mark is for [the] touch and feel of [the] product.”

120. U.S. Reg. No. 3348363.

121. U.S. Reg. No. 3845630.

In Germany, the term UNDERBERG in Braille is registered for various beverages:¹²²



However, the German trademark office refused registration for “the rough feeling of emery paper” for beer and other beverages.¹²³

G. Flavor Trademarks

Flavor marks are even more scarce than tactile marks.¹²⁴ In fact, they have uniformly run aground, and the authors could find no evidence of any registration for a flavor mark. In 2006, in the one reported United States case on flavor marks since our prior article, the TTAB upheld a refusal to register an orange flavoring as a trademark for “antidepressants in quick-dissolving tablets.”¹²⁵ An application for the same mark was also refused as a CTM by OHIM,¹²⁶ as was an application for an artificial strawberry flavor for pharmaceutical preparations.¹²⁷ There is a flavor mark application pending before the USPTO for “the distinctive flavor of peppermint in connection with nitroglycerin” for pharmaceutical formulations of nitroglycerin.¹²⁸ An Office Action provisionally refused registration on the grounds of functionality and failure to function as a trademark. In an astonishing attempt at thoroughness, however, it requested a specimen that the examining attorney can actually taste.¹²⁹

H. Beyond Nontraditional Trademarks

Just outside the nontraditional trademark universe, but still far afield of the traditional, there is a group that defies

122. German Reg. No. 30259811 (registered Dec. 3, 2003).

123. German App. No. 301607192 (filed Oct. 18, 2001); German Federal Patent Court No. 26W (pat) 3/05 (Mar. 23, 2007).

124. For more on flavor marks, see Gilson on Trademarks, *supra* note 7, § 2.11[4], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 800-01. See also Amanda E. Compton, *Acquiring a Flavor for Trademarks: There’s No Common Taste in the World*, 8 Nw. J. Tech. & Intell. Prop. 340 (2010); Jessica Nicole Cox, Note, *Why Coca-Cola’s Fictional Lawsuit Against Coke Zero for Taste Infringement is a Losing Battle*, 17 J. Intell. Prop. L. 121 (2009).

125. *In re N.V. Organon*, 79 U.S.P.Q.2d 1639 (T.T.A.B. 2006).

126. CTM App. No. 003132404 (filed Apr. 14, 2003, refused Jan. 7, 2005).

127. CTM App. No. 001452853 (filed Jan. 1, 2000, refused Mar. 2, 2004).

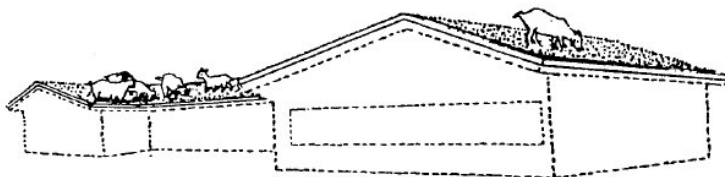
128. U.S. Ser. No. 85007428 (filed Apr. 6, 2010).

129. Office Action of July 14, 2010 for U.S. Ser. No. 85007428.

classification. They are not in the sound-taste-color-scent-product shape quintet, nor are they brand names or logos. They stand by themselves.

This group, often including motion or décor marks, is characterized by its sheer diversity and by the willingness of the USPTO to grant registrations. The term “trademark” in Section 45 of the Lanham Act “includes any word, name, symbol, or device, or any combination thereof.”¹³⁰ Under the spell of *Qualitex*, in which the Supreme Court gave it spectacular breadth as “almost anything at all that is capable of carrying meaning,”¹³¹ why indeed would the Office hold back? There are ducks marching into a pond in the middle of a hotel lobby, architectural features of video game arenas, and a spray of water blasting from a jet-propelled watercraft. What’s next? Elephants in a stream, the LeBron dunk shot, a very dry martini pouring from a penguin-shaped cocktail shaker?

This is the mark that stands at the beyond nontraditional summit. Consider goats doing what goats do, but on the grass roof of a building housing a restaurant. Sheer genius. The service mark, registered on the United States Principal Register for restaurant services, consists of “goats on a roof of grass”¹³²:



But could there possibly be two? The registrant actually filed suit seeking to stop another business, 750 miles away, from continuing “to offer food services from buildings with goats on the roof.”¹³³ However (sad to say for legal community interest), plaintiff dismissed its claim without prejudice in March of 2010. The terms of any settlement agreement are unknown.

130. 15 U.S.C. § 1127.

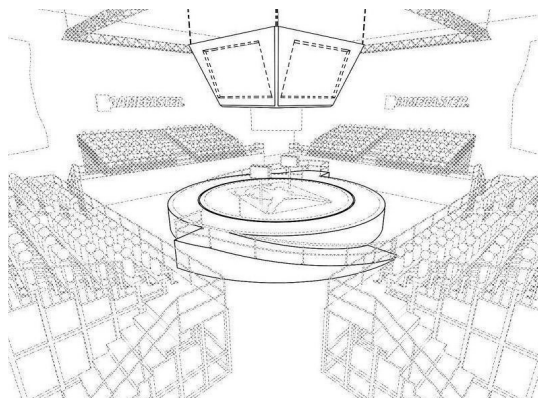
131. *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163 (1995).

132. U.S. Reg. No. 2007624.

133. *Al Johnson’s Swedish Restaurant & Butik, Inc. v. Goats on the Roof at Tiger Mountain Mkt., LLC*, 09-CV-00192 (N.D. Ga.). See Justin Scheck & Stu Woo, *Lars Johnson Has Goats on His Roof and a Stable of Lawyers to Prove It: Having Trademarked the Ungulate Look, Restaurateur Butts Heads With Imitators*, Wall St. J., Sept. 17, 2010, at A1.

Rudimentary retail features, sometimes of the most ordinary sort, can constitute enforceable, registrable trade dress.¹³⁴ A federal district court in Utah granted a preliminary injunction ordering one sushi restaurant to stop using certain elements of the trade dress of another.¹³⁵ The court held that “Happy Sumo’s ‘total image, design, and appearance’ create a protectable trade dress.” In a later opinion, proving the judge to be a serious stickler for detail, the court found a violation where (1) defendant’s sushi chef was dressed in black and navy blue, giving “the clear visual impression of the sushi chef being dressed in black clothing”; (2) curtains were drawn to each side of its booths; and (3) two flat panel television sets were set behind the sushi bar.¹³⁶

In addition, the following décor is registered in the United States on the Principal Register (under § 2(f)) for organizing and conducting video game competitions:¹³⁷



And this mark is on the Principal Register for a restaurant interior:¹³⁸

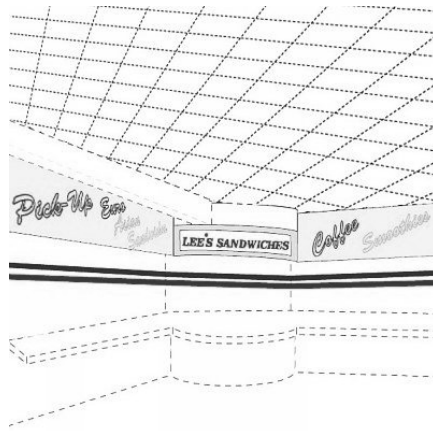
134. For more on décor marks, see Gilson on Trademarks, *supra* note 7, § 2.11[8][d], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 816. See also Lisa K. Krizman, *Trademark Protection for Restaurant Owners: Having Your Cake and Trademarking it, Too*, 99 TMR 1004 (2009) (“Specifically, this article addresses case law involving restaurant trade dress, federal trademark registration of menu items and restaurant services, the chef’s name as a trademark, using trademark law to protect a claim to fame of being the first to invent a well-known food item, food with unique shapes or packaging, and ‘signature dishes.’”).

135. *Happy Sumo Sushi, Inc. v. Yapona, Inc.*, 89 U.S.P.Q.2d 1380 (D. Utah 2008).

136. *Happy Sumo Sushi, Inc. v. Yapona, Inc.*, 2008 U.S. Dist. LEXIS 77715 (D. Utah 2008).

137. U.S. Reg. No. 3285508.

138. U.S. Reg. No. 3106012.



Motion marks serve as source indicators simply by using images in motion.¹³⁹ They can include a moving, changing logo or a human figure in motion. One motion mark registered as a European CTM for soaps and brushes, among other products, is the following, shown as a series of images that make up the motion mark:¹⁴⁰

139. For more on motion marks, see Gilson on Trademarks, *supra* note 7, § 2.11[7], and Gilson & LaLonde, *Cinnamon Buns*, *supra* note 1, at 806-08.

140. CTM Reg. No. 002762813 (registered Jan. 7, 2004). The description of the mark is as follows: "Moving mark consisting of 6 individual images. The representation time is 14.5 seconds; the filmic representation is set out as follows; the movement of a hand is shown, stroking the hair of a woman; image 1: representation time: 1 second; the side profile of a woman is shown (head turned to the left); a hand lies on her hair, not far from the hairline; image 2: representation time: 1.5 seconds: the hand strokes the woman's hair; only the hair and the left eye of the woman are visible; her hair has a sheen at the hairline; image 3: representation time: 2 seconds; the hand strokes the woman's hair, coming to rest further down the hair; the sheen on her hair moves as the hand moves downwards; side profile of the woman (head turned to the left, only the left eye showing); image 4: representation time: 2.5 seconds: the hand continues to stroke the woman's hair; white dots appear at the hairline; a sheen appears on the hair underneath; side profile of the woman, head turned to the left, face showing down to the mouth; image 5: representation time: 3.5 seconds: the white dots and the sheen on the hair move further downwards along the hair; the hand is no longer visible; image 6: representation time: 4 seconds: side profile of the woman without the hand on her hair; the white dots and the sheen move further downwards and come to rest at the end of the hair."



One mark registered in the United States on the Principal Register is “a sequence of three vertical blue LED lights, illuminated in descending sequence and then repeating in descending sequence, placed conspicuously on the front of the goods,” which are electronic payment devices for vending machines and other such equipment.¹⁴¹ Another motion mark that consists of “a pre-programmed rotating sequence of a plurality of high intensity columns of light projected into the sky to locate a source at the base thereof” is registered on the Principal Register (under § 2(f)) for high intensity searchlights.¹⁴² Similarly, another mark consists of “a three dimensional spray of water issuing from the rear of a jet propelled watercraft and is generated during the operation of the watercraft.” It is registered for jet-propelled water vehicles on the Principal Register (under § 2(f)).¹⁴³

Hand gestures may also be protectable trademarks.¹⁴⁴ The following is a registered mark in Germany for Deutsche Telekom AG:¹⁴⁵

141. U.S. Reg. No. 3352247.

142. U.S. Reg. No. 2323892.

143. U.S. Reg. No. 1946170.

144. Cf. F. Scott Kieff, et al., *It's Your Turn, But It's My Move: Intellectual Property Protection for Sports "Moves,"* 25 Santa Clara Computer & High Tech. L.J. 765 (2009).

145. German Reg. No. 30209488 (registered May 7, 2004).



Another registered hand gesture is “a gesture made by a person by tapping one side of his/her nose with an extended finger, normally the index finger of the hand on the side of the nose being tapped.” This gesture is registered in the United Kingdom for mortgage, investment and pension services.¹⁴⁶

For every one of these marks beyond the nontraditional that make it to registration, several others do not. But all told, the trend continues to extend registration protection to the unforeseen or unusual, and the USPTO is a willing participant.

IV. THE SENSE-IMPAIRED

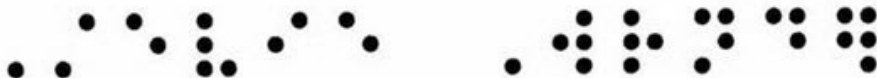
Braille-depicted, tactile trademarks and certain hand-signing marks form a uniquely specialized universe for the sense-impaired.

Braille, the writing system used by and for the blind, consists of a code of 63 characters, each made up of one to six raised dots in a six-position matrix. The sightless person reads the dots by gently passing fingers over them.¹⁴⁷ The USPTO registers marks in Braille alone, as with the mark STEVIE WONDER,¹⁴⁸ or in

146. U.K. Reg. No. 2012603 (registered Jan. 5, 1996).

147. 2 Britannica Micropaedia 465 (Encyclopaedia Britannica 1998).

148. U.S. Reg. No. 3495230 (for entertainment services) and 3495229 (for clothing) (Braille translates to STEVIE WONDER):



composite form.¹⁴⁹ A Braille-literate person shopping for a swimsuit can, for example, touch the dots on the hang-tag and determine the source of the garment.

Does it matter that the dots can be deciphered by only a small slice of the general population? Most would be perplexed by them, as they are in noting the dots indicating elevator floors. Still, nothing in the Lanham Act excludes such small-population, encoded marks. On the contrary, a Braille-depicted mark can “identify and distinguish [albeit to a limited population] goods . . . from those manufactured or sold by others.”¹⁵⁰ And a trademark can be “almost anything at all that is capable of carrying meaning,”¹⁵¹ there being no limit on the size of the population to which the meaning is carried.

But what about a trademark depicted in sign language? This system is used by and for the deaf, and is often used by a signer translating a verbal presentation. In the United States, sign language is a highly developed system with a very precise signing vocabulary and with signs even defined in dictionaries.

The American Sign Language system, or ASL, is used by more than 500,000 deaf people in the United States and Canada, and is the fourth most common language used in the United States.¹⁵² As with Braille marks, the USPTO registers sign language marks alone¹⁵³ or in composite form.¹⁵⁴

149. U.S. Reg. No. 3840579 (for leather pouches) (Braille translates to *H* and *W*):



150. 15 U.S.C. § 1127.

151. 514 U.S. at 162.

152. 10 Britannica Micropaedia 796 (Encyclopaedia Britannica 1998); Tamar Lewin, *Colleges See 16% Increase In Study of Sign Language*, N.Y. Times, Dec. 9, 2010, at A24). According to the *Times*, ASL has continued to surge in popularity, while the number of students studying Spanish, French, and German has increased only modestly. ASL ranked fourth after these three languages in fall '09 enrollment.

153. U.S. Reg. No. 1867056 (for clothing and sportswear) (sign language for “I LOVE YOU”):



Braille and ASL trademarks raise the same complicated issues as other nontraditionals, such as proving likelihood of confusion or secondary meaning. For example, applying the usual confusion test for similarity in sound, appearance or meaning may well pose a daunting challenge. Yet, as with other nontraditionals, all may be revealed in future decisions of the courts or the TTAB.

V. THE MARKETING DILEMMA

There is another less obvious obstacle to protecting nontraditional marks: marketing strategy. The basic legal requirements of distinctiveness and nonfunctionality pose unforeseen problems for many in business who are not preoccupied with trademark protection.

As Professor of International Business at Columbia Business School and Director of the Center on Global Brand Leadership, Professor Bernd H. Schmitt is a distinguished authority in the world of marketing. He is also CEO of The EX Group, a consulting firm focusing on innovation and customer experience.¹⁵⁵ For years Dr. Schmitt has been a leading proponent of using sensory stimuli in marketing products and services, and sums up his credo as follows:

SENSE marketing appeals to the five senses—sight, sound, scent, taste, and touch. The overall purpose of SENSE marketing campaigns is to provide aesthetic pleasure, excitement, beauty, and satisfaction through sensory

154. U.S. Reg. No. 3730902 (for instruction in the field of surfing) (sign language for letter Y):



155. He is also the author of seven books, including *Experiential Marketing: How to Get Customers to Sense-Feel-Think-Act-Relate To Your Company and Brands* (1999) and a previous book with Alex Simonson that also featured sensory experiences, *Marketing Aesthetics: The Strategic Management of Brands, Identity, and Image* (1997). He represents leading companies in consumer package goods, automobile, electronics, software, and beauty and cosmetics.

There is a spate of books on this subject, among them Martin Lindstrom's *Brand Sense: Build Powerful Brands Through Touch, Taste, Smell, Sight, and Sound* (2005) and Marc Gobé's *Emotional Branding: The New Paradigm for Connecting Brands to People* (2001).

stimulation. As one Hyatt slogan put it: “We believe the five senses should not only be stimulated but delighted.”¹⁵⁶

Schmitt thus strongly encourages businesses to incorporate sensory experiences into their marketing strategies.¹⁵⁷

Fine, but serious trademark problems loom. Take scent marketing, for example. It may be creative and effective in capturing the public's attention, but is it source-indicating? The CD booklet for singer Katy Perry's *Teenage Dream* album, released in August 2010, is cotton-candy scented.¹⁵⁸ *Sactown*, a bi-monthly magazine covering Sacramento, California, used a scratch-and-sniff cutout on its May 2010 cover, which highlighted a mandarin orange festival.¹⁵⁹ And the maker of a Polish cinnamon-scented vodka is spraying retail store shelves that carry its product with the scent of fresh cinnamon.¹⁶⁰

The tension between nontraditional trademarks used in sensory marketing and the trademark requirement of identifying the source of products is palpable. A trademark *must* identify source, and if a scent or flavor or texture just makes a product smell, taste, or feel more desirable, that may well be its legal death knell.

In terms of trademark protection, marketing can also be self-destructive in directing consumers to a product's useful features.¹⁶¹ Courts and the TTAB, particularly those following the *Morton-Norwich* test for functionality,¹⁶² rely on advertising that promotes functional advantages to hold that the product or one of its features is unprotectable.¹⁶³ For example, the TTAB found

156. *Experiential Marketing*, *supra* note 155, at 99.

157. See Stuart Elliott, *Joint Promotion Adds Stickers to Sweet Smell of Marketing*, N.Y. Times, Apr. 2, 2007, at C5. (Starbucks gravitated to a berry scent for stickers on copies of *USA Today* because it made consumers go “yum yum,” and the smell of its coffee was too difficult to duplicate); Margaret Webb Pressler, *Appealing to the Senses; Aromatic Packaging is Just the Start of Futuristic Sales Ploys*, Wash. Post, Feb. 19, 2006, at F1; *What's That Smell?* Forbes, Oct. 2, 2006, at 76. (“Sony spritzes 36 Sony Style stores with a . . . vanilla-and-mandarin aroma to put gadget gawkers in the mood to spend.”); Westin Hotels & Resorts magazine advertisements featuring peel-away sniff panels and touting “White tea. The calming new scent of Westin. This is how it should feel.SM”

158. See “The Making of Katy Perry's ‘Teenage Dream’ Album Packaging,” at www.youtube.com/watch?v=Cu9wk2KCCYU.

159. Joseph Plambeck, “A Magazine That Smells Orange,” N.Y. Times, June 7, 2010.

160. See www.cedc.com/news/brand/vodka-manufacturer-to-use-scent-marketing.

161. See Gilson on Trademarks, *supra* note 7, § 2A.04[4][c].

162. *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1341 (C.C.P.A. 1982) (As evidence of functionality, “[i]t may also be significant that the originator of the design touts its utilitarian advantages through advertising.”).

163. *E.g.*, *Fuji Kogyo Co. v. Pacific Bay Int'l, Inc.*, 461 F.3d 675, 685-86 (6th Cir. 2006) (finding fishing line guide functional and noting advertising of useful features, including

advertisements “particularly significant” in finding functionality of the orange flavor of an antidepressant tablet where the applicant’s website indicated that the flavor “increases patient compliance and is an important advantage over other tablets.”¹⁶⁴

VI. CONCLUSION

So what is next? Today, fifteen years after the Supreme Court in *Qualitex* proclaimed the Age of the Nontraditional Trademark, there is no danger that nontraditionals will become extinct any time soon. We can say, however, that the road ahead for all of them will continue to be rough. Sound, color, and product shape marks, as well as brilliant marks like goats on the roof, will emerge in limited numbers, but they definitely will emerge. Flavor, texture, and scent may or may not emerge; as a group they have far greater chances to fail. By failure, we mean they are not likely to be embraced *as trademarks* by the business community, and though they may eke out a tiny group of federal registrations, they will face an almost insurmountable challenge and a likely unfriendly attitude in the courts and before the TTAB.

Hurdles to enforcement of nontraditionals are unlikely to crumble, although the USPTO will continue registering these marks at a brisk rate. In adjudicating disputes involving these marks, courts must balance the need to preserve competition with the need to respect trademark rights and, above all, to protect the public from deception and confusion. And who knows—the enforcement outlook may well improve if the public comes to recognize nontraditionals first and foremost as designating source.

One day, enforcement of the penguin-shaped cocktail shaker may reach the Supreme Court, giving the Court an opportunity to review its untoward comments in *Wal-Mart*. Perhaps then we can combine a history lesson with a nice, cold, very dry martini, shaken but not stirred.

mention of its “super light, super fast, yet strong[,] no-welded one-piece frame construction”); *Talking Rain Beverage Co. v. South Beach Beverage Co.*, 349 F.3d 601, 603-04 (9th Cir. 2003) (finding bottle shape functional and noting advertising suggesting that the bottle is easy to grip); *Valu Eng’g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274-75 (Fed. Cir. 2002) (finding conveyer guide rail configurations functional and noting advertising touting the utilitarian advantages of the designs).

164. *In re N.V. Organon*, 79 U.S.P.Q.2d 1639 (T.T.A.B. 2006).