

## Trademark, Trade Dress, and Patent Protection

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## Protections other than Copyright

- ✧ The protections under unfair competition, trade dress, and patent are separate from copyright protection.
- ✧ Courts have said that copyright is an exclusive remedy where the problem is alleged copying of work or forgery.

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## Application of other protection

- ✧ These other types of protection apply when copyright does not fit the situation.
- ✧ Usual situation: someone creates a work that copies the style or image of an item in a way that causes confusion about the origin.

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## Unfair Competition

- ✧ Unfair competition claims arise when a product bears such a striking resemblance to a pre-existing product that people would be confused by the similarity.
- ✧ Idea: confuse the public and benefit from a well-established reputation.
- ✧ At same time, sale of original products suffers from the similar product.

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## Trademark and Trade Names

- ✧ Trademark is a distinctive motto, symbol, or emblem associated with a particular product and manufacturer.
- ✧ Idea: product with this mark distinguished from other products.
- ✧ Trademarks registered with Patent Office.

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## Trademarks

- ✧ Artists and designers, especially, might register a logo or emblem to protect its use.
- ✧ One condition of registration: must not infringe on a trademark already registered.
- ✧ May be registered before use ("intent to use"), then re-registered after use.

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## Trademarks

- ✧ Do not need to register trademark for protection. Simply using a distinctive mark is sufficient.
- ✧ Registration is necessary to use the symbol ® which indicates a registered trademark.

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## Trade Names

- ✧ Trade names similar to trademarks.
- ✧ Are not technically trademarks because not associated with products or goods.
- ✧ Trade names used to create identity of business or location of business.
- ✧ Must register trade name with local or state government to clarify ownership of business.

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## Trade Dress

- ✧ Trade dress cases arise when someone creates a work that is very similar to the original.
- ✧ The Lanham Act, the federal statute that covers Trademark law, includes a section that provides protection for trade dress.

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Hartford House Ltd v. Hallmark Cards

- ✧ Influential case on trade dress protection decided in 1988.
- ✧ Hartford House did business as Blue Mountain Arts.
- ✧ Created very successful line of greeting cards intended to express strong emotions.
- ✧ Lines: Airebrush Feelings (1981) and Watercolor Feelings (1983).

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Hartford House Ltd v. Hallmark Cards

- ✧ Hallmark created a competing line, Personal Touch, but not successful at first.
- ✧ In 1986, redesigned Personal Touch line so they were very similar to Blue Mountain's lines.
- ✧ Blue Mountain sued for infringement of trade dress.

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Hartford House Ltd v. Hallmark Cards

- ✧ Court: 3 elements necessary to prove trade dress claim:
  - ✦ Features of trade dress are non-functional.
  - ✦ Trade dress has secondary meaning.
  - ✦ Competing products' respective trade dresses are confusingly similar, with likelihood of confusion among consumers.

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Hartford House Ltd v. Hallmark Cards

- ✧ Non-functional features are those whose primary value is to identify the source of the goods.
- ✧ Secondary meaning refers to the effect of trade dress to identify the source of the product rather than the product itself.

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Hartford House Ltd v. Hallmark Cards

- ✧ Likelihood of confusion:
  - ✦ Similarity of products
  - ✦ Identity of retail outlets and purchasers
  - ✦ Identity of advertising media
  - ✦ Strength of trade dress
  - ✦ Defendant's intent
  - ✦ Similarity of design
  - ✦ Presence of actual confusion
  - ✦ Degree of care by consumers to distinguish
  - ✦ Other evidence showing confusion likely

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Hartford House Ltd v. Hallmark Cards

- ✧ All factors went against Hallmark in that case.
- ✧ 70 - 80% of consumers confused the greeting cards.
- ✧ Remedy: injunction against Hallmark ordering them to stop selling the cards.

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### Harlequin Enterprises case

- ✧ Another trade dress case involved similarity between book covers.
- ✧ Harlequin romances established distinctive look of its books.
- ✧ Silhouette Romance series developed by Simon and Schuster with very similar cover designs.

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### Harlequin Enterprises

- ✧ Cover selected for Silhouette series was one that most closely resembled Harlequin of all designs prepared.
- ✧ Confusion likely to result because of similarity between designs.
- ✧ Injunction issued preventing Simon and Schuster from using cover design.

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### Andy Warhol calendar case

- ✧ A calendar manufacturer selected 12 Warhol images to make into a calendar.
- ✧ Images not protected by copyright.
- ✧ Warhol estate and foundation sought to prevent their use based on trade dress violation.

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### Andy Warhol calendar

- ✧ Court found no basis for violation, since the Warhol representatives had no similar product, and thus no trade dress to protect.
- ✧ Must have existing product with distinctive trade dress to gain protection under this theory.

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### Trademarks and Colors

- ✧ In one case (*Qualitex vs. Jacobson Products*), the U.S. Supreme Court said that color can be registered as a trademark, as long as it has acquired a secondary meaning.
- ✧ That case involved a distinctive green-gold color for cleaning pads used by dry cleaners. A competitor started producing pads in the same color.

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### Trademarks and Colors

- ✧ These cases are determined by their facts.
- ✧ If color has a function - including an aesthetic function- it cannot be registered as trademark.
  - ✦ John Deere green?
  - ✦ Target red?
  - ✦ Coca-Cola red?

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## Trade Dress and Product Design

- ✧ Product design can have trade dress protection (as distinguished from product packaging), but only if it has a secondary meaning signifying the maker of the product.
- ✧ Case: *Wal-mart Stores v. Samara Bros* - Samara made a line of children's clothing decorated with appliques.

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## Trade Dress and Product Design

- ✧ Wal-mart sent photos of the clothing to its overseas supplier with instructions to make copies.
- ✧ Wal-mart then started selling the clothing which was essentially indistinguishable from the original designs.

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## Trade Dress and Product Design

- ✧ Court: in this case, the product design did not have a secondary meaning relating to Samara, so not a trade dress violation to copy the design.
- ✧ Idea: product packaging is inherently distinctive, but product design is not and needs secondary meaning to be protected trade dress.

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## Patents

- ◇ Patents can be acquired for works of art, but much more difficult.
- ◇ Must prove that the work is totally original.
- ◇ Two types:
  - ✦ Utility patent
  - ✦ Design patent

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## Utility Patent

- ◇ Object must be useful - functional.
- ◇ Must be original
- ◇ Must not be obvious to people skilled in the discipline involved.
- ◇ Term: currently 20 years, nonrenewable.
  - ✦ Was 17 years for patents filed before June 8, 1995.

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## Design Patent

- ◇ More common type of patent
- ◇ Term = 14 years
- ◇ New, original, ornamental, and not obvious.
- ◇ Does the object, viewed as a whole by an ordinary observer, give the impression of uniqueness of character?

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## Patents

- ✧ Patents are difficult and expensive to obtain.
- ✧ Usually need assistance of patent attorney to navigate the application process.
- ✧ Patents protect against exploitation of the design without meeting the copyright standards for copying.

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