



Distinctiveness

Trademark & Unfair Competition
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Konomark
Most rights sharable

source

source

source

source

distinctiveness

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distinctiveness



inherently distinctive	fanciful arbitrary suggestive					misdescriptive	inherently distinctive product packaging				
can acquire distinctiveness	merely descriptive		primarily geographically descriptive		deceptively misdescriptive		non-inherently distinctive product packaging product design color			primarily a surname	
unprotectable	generic		primarily geographically deceptively misdescriptive		deceptive		functional			names/likenesses of living people without consent gov't symbols	

- ## The need for distinctiveness
- Whether to be registered on the principal register under the Lanham Act (§ 2), or
 - whether to be protectible under the common law or 43(a) of the Lanham Act
 - a mark must be distinctive!
 - It is only by being distinctive that it can signify a source.
 - To be distinctive, marks can either be inherently distinctive or can acquire distinctiveness.

Two ways to be distinctive

- “First a mark is inherently distinctive if ‘[its] intrinsic nature serves to identify a particular source.’”
- “Second, a mark has acquired distinctiveness, even if it is not inherently distinctive, if it has developed secondary meaning, which occurs when, “in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.”

Wal-Mart v. Samara Brothers (U.S. 2000)
(citing Inwood Labs v. Ives Labs (U.S. 1982))

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Let's talk about terms

- “**trademark**” in general usage (very broad) vs. “**trademark**” under the Lanham Act (specific statutory meaning of a mark for goods in the context of federal registration)
 - You have to think about which sense is meant when reading something.
- Lanham Act is picky with terms, recognizes four marks, which it talks about in the context of registration:
 - “**trademark**” mark for goods
 - “**service mark**” mark for services
 - “**certification mark**” mark certifying things in commerce by a neutral third-party
 - “**collective mark**” mark for belonging to a collective/organization
- “trade dress” is just a term that means a particular kind of **trademark** that's not a logo or word mark, but is product packaging, product configuration

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