

deceptively misdescriptive and deceptive ...

Deceptively Misdescriptive vs. Deceptive

Deceptively misdescriptive:

- The mark immediately conveys an idea that is false yet plausible, but it is not material to the purchasing decision of a significant portion of relevant consumers.
- Registrable/protectable only with secondary meaning.

Deceptive:

- The mark immediately conveys an idea that is false yet plausible, and it is material to the purchasing decision of a significant portion of relevant consumers.
- Not registrable/protectable at all.

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Budge/Shapley test for Deceptiveness

Is it deceptive and not registrable/protectable?

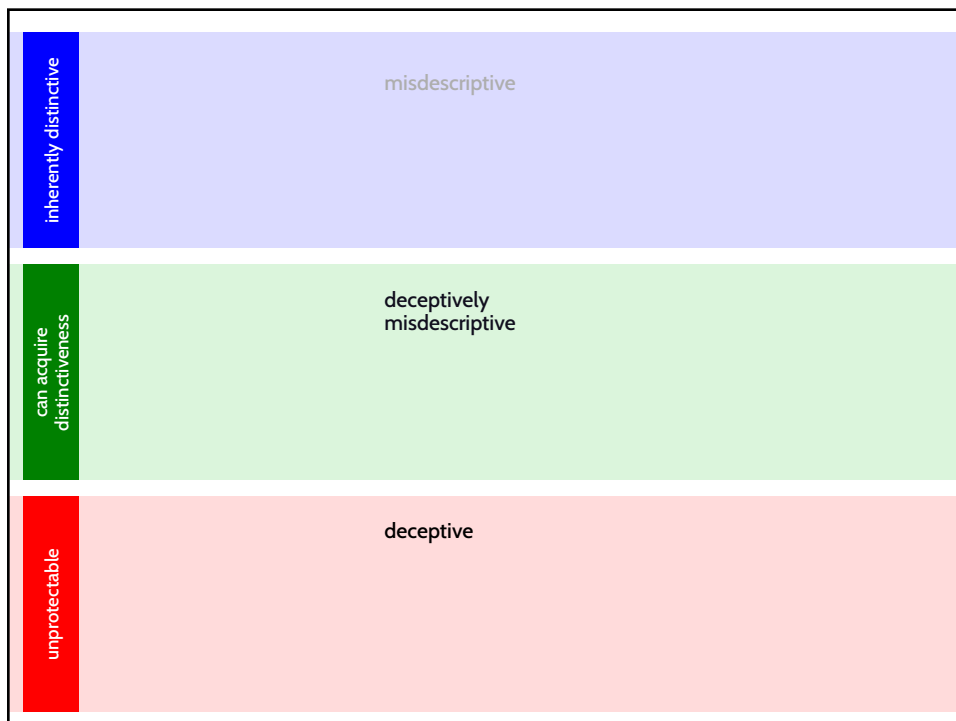
- Ask (1) whether the term is misdescriptive as applied to the goods, (2) if so, whether anyone would be likely to believe the misrepresentation, and (3) whether the misrepresentation would materially affect a potential purchaser's decision to buy the goods.
→ If the answer to all questions is YES, then it's deceptive.
- Also consider this "amplification" of the standard:
 - (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?
 - (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?
 - (3) If so, is the misdescription likely to affect the decision to purchase?→ Again, if you get a YES from all of these, then it's deceptive.

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

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We're gonna remember these with "IRONROOF"

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Note that “**misdescriptive**” isn’t an official category name. That’s why I put it in gray. But consider that if a word mark is, in fact, **misdescriptive** (but not *deceptively* misdescriptive) then that’s really the same as saying saying that it is **arbitrary**, in which case it’s inherently distinctive.

So I like using the word “**misdescriptive**” (understanding it equals “arbitrary”) as a helpful reference point in learning **deceptively misdescriptive** and **deceptive**.

IRONROOF

- for a restaurant with an aluminum-panel and asphalt-shingle roof
- for a tornado shelter made of plastic
- for accounting software

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Okay, where would you put these three examples?

IRONROOF

- for a restaurant with an aluminum-panel and asphalt-shingle roof
- for a tornado shelter made of plastic
- for accounting software

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inherently distinctive	misdescriptive	<p>IRONROOF (for accounting software)</p>
can acquire distinctiveness	deceptively misdescriptive	<p>IRONROOF (for a restaurant with aluminum-panel and asphalt-shingle roof)</p>
unprotectable	deceptive	<p>IRONROOF (for a tornado shelter made of plastic)</p>