

Publications

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"Now and Later": Using Design Patents and Trade Dress to Maximize Protection for Product Designs

Key Takeaways

- Two forms of intellectual property protection — design patents and trade dress— can offer distinct forms of protection for consumer products at different points in the product's lifecycle.
- Timing can determine whether protection is available. Public disclosure before filing can jeopardize design patent rights, especially in foreign jurisdictions, and trade dress rights generally require marketplace recognition that develops over time.
- Businesses should plan early and revisit protection over time. Coordinating design patent filings, evidence of acquired distinctiveness and later trade dress reviews can help extend protection for valuable product designs.

Businesses that invest in product design should consider intellectual property protection early in the development process and continue evaluating protection as their products gain recognition in the marketplace.

Two forms of intellectual property protection are particularly relevant for consumer products and everyday items: design patents and trade dress. Although both can protect a product's appearance, they serve different purposes and are most effective at different stages of the product lifecycle.

An effective strategy is often a "now and later" approach: pursue a design patent now, before introducing the product to the market, and consider trade dress protection later — after consumers have come to recognize the product's appearance as identifying your brand.

File Design Patent Applications Early

A design patent protects the ornamental appearance of a product, including its shape, surface ornamentation or a combination of both. Unlike a utility patent, which protects how an invention works, a design patent protects how a product looks.

Design patents provide protection for 15 years from the date of grant, but timing is critical.

Related People

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Related Capabilities

- Intellectual Property
- Trademark, Copyright & Branding
- Patent Preparation & Prosecution
- Product Design & User Interface

Businesses should generally file a design patent application before publicly disclosing, using or offering the product for sale. Early filing helps establish priority with the U.S. Patent and Trademark Office (USPTO) and preserves the ability to pursue design protection in many foreign jurisdictions.

Although U.S. law generally provides a one-year grace period following public disclosure, many countries require absolute novelty, meaning that public disclosure before filing can eliminate foreign design patent rights.

Consider Trade Dress Protection After Marketplace Recognition Develops

Trade dress protects the overall appearance of a product when that appearance functions as a source identifier. Non-functional features such as product configuration, shape, color combinations, texture and other visual features may qualify for protection if consumers associate those features with a particular source.

Unlike design patents, however, trade dress protection generally is not available immediately after a product launch; they require use in commerce over a period of time first to establish distinctiveness or secondary meaning.

Distinctiveness is a fundamental requirement for trademark and trade dress protection. A trademark or trade dress must be capable of identifying the source of goods or services and distinguishing them from those of others. As a matter of law, product design is not inherently distinctive.

To obtain a federal registration, the applicant must submit evidence demonstrating that the product design has acquired distinctiveness, meaning that consumers have come to recognize the product's appearance as identifying a single source. Evidence of acquired distinctiveness may include:

- Long-term and substantially exclusive use of the product design;
- Significant advertising and promotional expenditures;
- Commercial success and sales history;
- Consumer surveys or market research; and
- Declarations or other evidence demonstrating consumer recognition.

Because this evidence develops over time, trade dress applications are typically filed only after a product has established a meaningful presence in the marketplace.

Functional Features Cannot Be Protected as Trade Dress

Trade dress protection is unavailable for functional product features. A product feature is generally considered functional if it is essential to the product's use or purpose or if it affects the product's cost or quality. Trademark law protects source identification, not functional product designs that competitors should remain free to use.

Accordingly, businesses should evaluate whether the design elements they seek to protect are primarily ornamental or instead serve a functional purpose.

Design Patents and Trade Dress Can Be Complementary

Businesses sometimes view design patents and trade dress as alternative forms of protection. But in many cases, they are complementary.

A design patent can provide valuable protection during the early years following a product

launch. As the product gains marketplace recognition, trade dress protection may become available. Because federal trade dress registrations may be renewed indefinitely, trade dress can provide protection long after a design patent expires.

Companies with successful product lines should periodically review whether products protected by design patents have also developed the distinctiveness necessary to support trade dress protection.

Best Practices for Protecting Product Designs

An effective intellectual property strategy does not end when a product launches. By coordinating design patent filings early and evaluating trade dress protection as products mature in the marketplace, businesses can often extend protection for valuable product designs and strengthen their competitive position.

Businesses should consider the following best practices:

- File design patent applications before publicly disclosing, using or offering a product for sale whenever possible.
- Consider international filing strategies before product launch, particularly if foreign markets are important.
- Maintain records of advertising, sales and marketing efforts that may later support a claim of acquired distinctiveness.
- Periodically review mature product lines to determine whether trade dress protection has become available.
- Evaluate whether products protected by design patents have developed the distinctiveness necessary to qualify for trade dress protection before the design patent expires.
- Work with counsel to develop a coordinated intellectual property strategy that aligns with product launch timelines and long-term brand objectives.

For more information on protecting product designs, contact the alert authors or your preferred Polsinelli attorney.