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TRADE DRESS AND SECTION 43(A) [n.1] OF THE LANHAM ACT: PROTECTION FOR "TOTAL IMAGE" OF THE VISUAL DISPLAYS OF SOFTWARE APPLICATIONS [n.2]

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I. INTRODUCTION

The Supreme Court, in Two Pesos, Inc. v. Taco Cabana, Inc. [n.4], held that if the "total image" of a trade dress is inherently distinctive, [n.5] a plaintiff need not prove that the public has grown to recognize the trade dress as coming from a single source (i.e., that it has secondary meaning) for the trade dress to be protectable under section 43(a) of the Lanham Act. Previously, several circuit courts had held that such recognition must be proven in order to establish a protectable trade dress under section 43(a). [n.6] The Two Pesos jury in the lower court, however, found that the defendant had copied the distinctive appearance (trade dress) of the plaintiff's restaurant, despite the fact the appearance of the plaintiff's restaurant had not yet developed a reputation sufficient to facilitate instant recognition among the plaintiff's relevant consumers. [n.7]

The purpose of this comment is to address, in light of the Two Pesos decision, each element of a trade dress action under section 43(a) of the Lanham Act and to determine 43(a)'s applicability to the visual images created by software applications on visual displays (displays). Particularly, this comment uses Apple Computer (R) [n.8] as a hypothetical plaintiff, and addresses the evidence needed to establish the visual image characteristic of the Macintosh (R) graphical user interface (GUI), as a trade dress protectable under section 43(a). The elements of a trade dress cause of action are: the definition of trade dress; inherent distinctiveness; trade dress functionality; and likelihood of confusion. Each element will be discussed individually in the pages that follow.

II. TRADE DRESS DEFINED

The first relevant step in establishing a trade dress cause of action is to define "trade dress". Trade dress is seen as the "total image" presented by the packaging or the product itself. [n.9] This total image can contain both functional and nonfunctional elements. [n.10] It is important, however, that a trade dress be examined as a whole rather than examining each individual element from which the trade dress is composed. For example, when examining the trade dress of a car, one must examine its "total image"

and not focus individually on its tires, bumpers, doors, or body moldings. One commentator noted, a trade dress is protectable if "as a whole the combination of elements involved is so distinctive as to indicate a particular origin, and a court must not confuse or complicate the basic fact by separate examination of the distinct parts." [n.11] Therefore, a defendant cannot claim that certain functional elements of a trade dress [n.12], which belong in the public domain, cause the trade dress as a whole to be unprotectable [n.13]. For example, one commentator noted that even if each element of a trade dress is in the public domain, the particular arrangement of those elements may form a protectable trade dress. [n.14] Therefore, a trade dress is a "total image" of a product that comprises a combination of functional and nonfunctional elements which are to be examined as a whole.

If Apple Computer is to show that the visual image of its Macintosh GUI is a trade dress, Apple must establish that the visual image of the GUI, as a whole, is capable of identifying Apple Computer as its source. More precisely, Apple must establish that the Macintosh GUI is a visual image which is either inherently distinctive or has over time become a source indicator through public recognition of the product. Due to the exceptional popularity of the Apple Macintosh computer and its distinctive GUI, it seems likely that the GUI image serves to identify Apple Computer as its source. Thus, it would appear that any visual image created by a software application could potentially serve as a source identifier.

III. INHERENT DISTINCTIVENESS

The Supreme Court, in Two Pesos, accepted the same categories of distinctiveness for trade dress as those commonly used for trademarks. [n.15] Those categories are; generic, descriptive, suggestive, arbitrary, and fanciful. [n.16] The Court stated, " t he latter three categories of marks, because their intrinsic nature serves to identify a particular source, are deemed inherently distinctive and are entitled to protection." [n.17] The term "Apple", as used to identify computers, is arbitrary because apples have little if anything to do with computers. Thus the designation of "Apple" for a computer is inherently distinctive. Such a mark or an equivalently arbitrary trade dress is protectable, even if it has no secondary meaning (no acquired function as a source identifier) among relevant consumers. [n.18] A descriptive trade dress, on the other hand, at the time of its creation represents a commonly understood configuration of elements used to identify the corresponding product. [n.19] That is, a descriptive trade dress visually suggests the type of product which it represents. For example, a lemon shaped bottle used to sell lemon juice merely describes the product (lemon juice) and would be required to show secondary meaning in order to receive protection. [n.20] A merely descriptive trade dress may also be entitled to protection if it is established that the public has grown to associate that particular trade dress with a single source. [n.21] Therefore, if the "total image" of a trade dress creates an unexpected visual image of the particular product it represents, then the trade dress is inherently distinctive and protectable, even if it is not shown to have secondary meaning. [n.22]

In order to prove inherent distinctiveness, Apple Computer can claim the total image on the Macintosh display is a computer software application designed as a means of creating a user friendly GUI. If Apple Computer can establish the visual image of the Macintosh GUI, at the time of its creation, constituted a fundamentally unexpected visual image for a computer software application, then the "total image" of Apple Computer's Macintosh GUI is an inherently distinctive trade dress. Computer applications can appear in forms from simple binary code to elaborate graphical images, including everything between these two extremes. Considering this range of possibilities, it seems unlikely that the Apple Macintosh GUI merely describes a computer software application. Even so, if Apple Computer cannot prove the "total image" of its Macintosh GUI is inherently distinctive, then the Macintosh GUI trade dress may still be entitled to protection, provided Apple Computer can establish that the "total image" of its Macintosh GUI has achieved secondary meaning. [n.23]

IV. FUNCTIONALITY

Courts have only recently begun to clearly define the term "functionality" with regard to trade dress. An example of this is found in a decision involving Morton-Norwich's [n.24] design of a spraying bottle. In the In re Morton-Norwich case, the Court of Customs and Patent Appeals (C.C.P.A.) expressed,

"In what way is the subject matter functional or utilitarian, factually or legally? (cite omitted)".... This definitional division, ... leads to the resolution that if the designation "functional" is to be utilized to denote a legal consequence, we must speak in terms of de facto functionality and de jure functionality, the former being the use of "functional" in the lay sense, indicating that although the design of a product, a container or a feature of either is directed to the performance of a function, it may be legally recognized as an indication of source. De jure functionality, of course, would be used to indicate the opposite--such a design would not be protected as a trademark. [n.25]

Since all trade dress are functional to a certain extent, the C.C.P.A., by allowing protection of trade dress which serve functions, distinguished factual functionality (defacto) and legal functionality (de jure) and established rules by which courts could determine to what extent a trade dress could be functional and still be protectable. The C.C.P.A. felt that previous courts had been far too loose in their use of the word "functional" with regard to trade dress. A distinction between de jure and de facto functionality allowed the C.C.P.A. to grant protection to trade dress despite its functional attributes. A de jure functional trade dress exists, if there are no other, or at least very few, appropriate or economically realistic trade dress configurations for that particular product. A de jure functional trade dress is not entitled to protection. [n.26] Therefore, a plaintiff must be able to prove that its trade dress is de jure nonfunctional. [n.27] The principle underlying this rule is that a trade dress cannot be protected if doing so seriously undermines a competitor's ability to compete by creating a monopoly for the trade dress owner. [n.28] For example, one court noted that " a football's oval shape is functional because it would be found in all or most brands of the product even if no producer had any desire to have her brand mistaken for that of another." [n.29] That is,

if the trade dress represents one of only a few inexpensive and efficient ways in which the product can appear, then it is de jure functional and therefore unprotectable. Another court has noted, " t he need to avoid monopolization of a design lessens, ... in the area of distinctive trade dress." [n.30] This is true because a trade dress is viewed as a whole, and therefore protected as a whole. [n.31] It is important to note, the functionality question focuses on how the trade dress appears, rather than how it functions. This is supported by the C.C.P.A.'s statement, "we cannot say that the subject design is 'functional' merely because a hollow body, a handhold, and a pump sprayer are 'essential to its use'." [n.32] The rationale underlying this statement is, that to do so would be to focus on the functional elements which make up the trade dress. Instead, as noted earlier, trade dress must be examined as a whole (total image) [n.33], and only if the trade dress as a whole is de jure functional, is it unprotectable because of funtionality. Therefore, competitors are entitled to use any number of the de facto functional (unprotectable) elements of each others trade dress unless, as a whole, the visual image is likely to cause confusion between the competitors' products. [n.34] As was noted by the Ninth Circuit Court of Appeals in Fuddruckers, Inc. v. Doc's B.R. Others, [n.35]

[v]iewing the elements as a whole does not result in monopoly for necessary elements. If Fuddruckers were to get protection for its trade dress, which includes such items as directors chairs, white tile, and an open bakery, it could not preclude other restaurants from using those items. It can only prevent competitors from using the items in a way that, viewed as a whole, is likely to confuse consumers. There are many ways to use directors chairs, white tile, open bakeries, and many other items that make up Fuddruckers' trade dress that would not cause confusion. [n.36]

Hence, if a party can establish that there are many relatively inexpensive and efficient ways to visually configure the functional and nonfunctional elements in a competitive tradedress for a particular product, then despite the de facto functionality of many of those elements, the trade dress itself would not be de jure functional.

Prior to discussing functionality as it applies to visual images on a visual display, it is necessary to distinguish between elements of a computer software application which are noncopyrightable due to the merger of idea and expression and those same elements as part of a protectable trade dress. [n.37] In copyright, the plaintiff cannot escape the actual function which each element of the visual image plays in the computer program.[n.38] Therefore if the source codes, of two nonconfusing visual elements in competitors' products, are very similar, there may be a copyright infringement of the first user's element, regardless of any differences or lack of confusion between the elements on the visual display. [n.39] That is, a computer software package is protectable if there is access and similarity between the competitors source codes, regardless of the differences of the software package's visual image on a display. [n.40] Likewise, if there are very few methods for the performance of a certain function within a computer software application, then a first-user-plaintiff would not be entitled to a copyright for the element, even if a defendant's visual image is very similar to that of the first-user-plaintiff. One court has stated that each element of a software application is to be examined individually and each unprotectable item removed from consideration. [n.41] After eliminating the uncopyrightable elements of a software application, little maybe left

for copyright law to protect. [n.42] On the other hand, source code and the limited availability of ways to achieve an element's desired function is irrelevant in a trade dress case. [n.43] Regarding the protection of visual images on a display, the focus is on the combined elements appearance as a whole, not on how those elements made their way onto the display. [n.44] This would be true, even if all examples of a particular functional element were virtually alike at the source code level. [n.45] Therefore, uncopyrightable elements may still be protectable (not individually) as part of the "total image" of a trade dress, because trade dress focuses on the total image created by the combined elements rather than how that total image reaches the visual display.

Regarding the functionality of Apple Computer's Macintosh GUI, Apple Computer would have to show GUI images which are inexpensive, efficient, alternate to, and competitive with their own Macintosh GUI. Those images also would have to be far less likely to cause confusion than would the GUI images chosen by an infringer. Perhaps the best way to create such alternate images would be to create a series of composites, using visually different configurations of functional elements from the Apple Macintosh Interface (perhaps including System 7 (R)), Microsoft Windows TM, IBM OS/2 (R), GeoWorks Ensemble (R), NeXT-step (R), UNIX (R) and other commercially available GUI software applications. [n.46] These composites would represent a series of inexpensive and noninfringing trade dress, which a defendant could have used. Similar to the protectable trade dress of a restaurant, such composites would illustrate that the total visual image of the Macintosh GUI is not itself functional although many of its individual elements may be functional. Thus such a series would prove the Apple Macintosh GUI is protectable. It is also noteworthy that a defendant would not be able to use Apple Computer's advertising to show that the trade dress is de jure functional because Apple's advertising merely touts the functionality of many of the elements which constitute the trade dress, not the visual appearance of the trade dress itself. [n.47]

V. LIKELIHOOD OF CONFUSION

"Under the Lanham Act section 43(a), the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks." [n.48] A likelihood of confusion analysis is therefore necessary in all section 43(a) infringement claims. [n.49] Most circuits have developed some variation of the following factors in order to determine likelihood of confusion:

1. strength of the plaintiff's mark;
2. degree of similarity between the plaintiff's and the defendant's marks;
3. proximity of the products or services;
4. likelihood that the plaintiff will bridge the gap;
5. evidence of actual confusion;
6. defendant's good faith in adopting the mark;
7. quality of the defendant's product or service; and
8. sophistication of the buyers. [n.50]

Section 43(a) offers many types of analyses for determining "likelihood of confusion". Congress, through the Trademark Law Revision Act of 1988, [n.51] substantially amended section 43(a) [n.52] of the Lanham Act of 1946 to read in pertinent part:

(a) Any person who, on or in connection with any goods or services or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person ...

... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act....

Congress' intent under this amended statute, is clear; that any person who with regard to goods or services in commerce, acts to create a likelihood of confusion as to association of such person with another person, or approval of business activities by another person, shall be liable in a civil action by any person who believes that she is likely to be damaged by such act. Therefore, a plaintiff does not have to prove that consumers may be confused about the source of a product, but rather that consumers might believe that there is some kind of association (joint venture) between a plaintiff and a defendant; or that a plaintiff approves of a defendant's copying of the trade dress. [n.53] In a sense this is "reverse confusion" resulting from a defendant who is "passing off" a plaintiff's goods as if they were the defendant's own. This activity is actionable under section 43(a). [n.54] Therefore, a plaintiff who owns a distinctive and nonfunctional trade dress and who can establish, based upon the total images of a plaintiff's and a defendant's products, that there is a likelihood of confusion among relevant purchasers regarding an association or approval between the plaintiff and the defendant, then that plaintiff's trade dress is infringed.

Assuming Apple Computer has established the visual image of the Macintosh GUI as a distinctive and de jure nonfunctional trade dress, Apple Computer would have to prove that relevant consumers were likely to be deceived or confused about the relationship between Apple Computer and a defendant in order to succeed in a section 43(a) infringement claim. Perhaps the best way to show such confusion would be to use the composites created for the issue of functionality. Apple Computer in a survey using those composites in addition to the total visual images of both Apple Computer's and a defendant's GUI's, could ask potential purchasers to name two (if any) visual images that appear to have been created by the same manufacturer. If a measurable number of people were to make an association between the visual images of Apple Computer's Macintosh GUI and a defendant's GUI, based solely on their appearance, then Apple Computer would have met much of the burden of establishing a likelihood of confusion and therefore infringement. Once trade dress infringement under section 43(a) has been established, all the remedies available under section 35 of the Lanham Act would apply. [n.55]

VI. CONCLUSION

The visual images created by software applications may be protectable as trade dress so long as those visual images are either inherently distinctive or have acquired secondary meaning; and are de jure nonfunctional. The holder of a protectable software trade dress would be entitled to relief if it were able to establish a likelihood of confusion between the "total images" of its trade dress and a defendant's trade dress. Therefore, because the visual image of the Macintosh GUI may be a distinctive and nonfunctional trade dress, it would appear that Apple Computer would be able to protect the total visual image of its Macintosh GUI as a trade dress.

[n.1]. 15 U.S.C.A. section 1125(a) as amended by 15 U.S.C.A. section 1125(a), 100th Cong., 2nd Sess. (1988).

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[n.4]. 112 S.Ct 2753, 120 L.Ed2d 615, 23 U.S.P.Q. 2d (BNA) 1081 (1992).

[n.5]. Two Pesos, Inc. v. Taco Cabana, Inc., 112 S.Ct at 2761. See infra Section III for further explanation of inherent distinctiveness.

[n.6]. See, e.g., Cicena Ltd. v. Columbia Telecommunications Group, 900 F.2d 1546, 14 U.S.P.Q.2d (BNA) 1401 (Fed.Cir.1990).

[n.7]. Id.

[n.8]. All trademarks are claimed or registered by their perspective users for the products which they represent. The trademarks are used in this comment for educational purposes only and the author in no way intends to undermine the strength of those marks.

[n.9]. See, e.g., Two Pesos, 112 S.Ct 2753, at 2755, n. 1.

See also Fuddruckers, Inc. v. Doc's B.R. Others, 826 F.2d 837 (9th Cir.1987); Reader's Digest Association, Inc. v. Conservative Digest, Inc., 821 F.2d 800 (D.C.Cir.1987); Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033 (2nd Cir.1992); American Greetings Corp. v. Dan-Dee Imports, Inc., 807 F.2d 1136 (3rd Cir.1986); Taco Cabana, Inc. v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir.1991); Ferrari S.P.A. v. Roberts, 944 F.2d 1235 (6th Cir.1991); Blau Plumbing, Inc. v. S.O.S. Fix-it, Inc., 781 F.2d 604 (7th Cir.1986); Prufrock, Ltd., Inc. v. Lasater, 781 F.2d 129 (8th Cir.1986); Hartford House, Ltd., Inc. v. Hallmark Cards, Inc., 846 F.2d 1268 (10th Cir.1988); John Harland Co. v. Clarke Checks, Inc., 711 F.2d 966 (11th Cir.1983).

See also J. Thomas McCarthy, Trademarks and Unfair Competition section 8:1 (2d ed. 1984); I. Rudolf Callmann, Unfair Competition, Trademarks and Monopolies section 20.34 (4th ed. 1987).

[n.10]. See, e.g., Two Pesos, 112 S.Ct 2753, at 2755, n. 1.

[n.11]. Callmann, supra note 9.

[n.12]. Further explanation of this argument can be found infra Section IV.

[n.13]. See, e.g., Two Pesos, 112 S.Ct 2753, at 2761; Fuddruckers, 826 F.2d 837, at 842.

[n.14]. Callmann, supra note 10, at 278 ("[i]n some cases, the similarity relates to the placement of corresponding elements in corresponding locations ...; and such similarities in placement may lead to a likelihood of confusion, even when the individual elements are in the public domain and are not confusingly similar to each other, apart from their location in relation to the other elements.").

[n.15]. Two Pesos, 112 S.Ct 2753, at 2757 (citing Abercrombie & Finch Co. v. Hunting World, Inc., 537 F.2d 4, at 9 (2nd Cir.1976)).

[n.16]. Id.

[n.17]. Two Pesos, 112 S.Ct 2753, at 2757.

[n.18]. Id.

[n.19]. Note, this would mean that if the genus of product itself never existed before the plaintiff's product, then the plaintiff's product could hardly be descriptive. For what would it be descriptive of besides itself.

[n.20]. See Sicilia Di R. Biebow & Co. v. Cox, 732 F.2d 417, 426 (5th Cir.1984).
Note, it would appear that a spreadsheet application might not be protectable without secondary meaning because the visual display would inherently always include cells for the placement of data. The appearance of such cells might be held to describe a spreadsheet and therefore be required to show secondary meaning prior to being found a protectable interest. See infra Section IV, because the trade dress of a spreadsheet might be found to be functional and unprotectable anyway.

[n.21]. Id.

[n.22]. See, e.g., Fuddruckers, 826 F.2d 837, at 842. See also Two Pesos, 112 S.Ct. 2753, at 2761.

[n.23]. Note, surveys are the most common ways of establishing that a product has secondary meaning and may be essential. See, e.g., Braun, Inc. v. Dynamix Corp. of America, 24 U.S.P.Q.2d (BNA) 1121, 1131 (Fed.Cir.1992).
Also, proof of intentional copying is a major factor in proving secondary meaning. See, e.g. Coach Leatherware Co. v. Ann Taylor, Inc., 933 F.2d 162, 169 (2nd Cir.1992).
Also, Section 1052(f) of the Lanham Act provides that 5 years of substantially exclusive use of a trademark in commerce is prima facie evidence of secondary meaning.

[n.24]. In re Morton-Norwich Products, Inc., 671 F.2d 1332 (C.C.P.A.1982).

[n.25]. In re Morton-Norwich, 671 F.2d 1332, at 1337.

[n.26]. See In re Morton-Norwich, 671 F.2d 1332 (C.C.P.A.1982); see also Two Pesos, 112 S.Ct 2753, at 2761.

[n.27]. See, e.g., Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 20 (7th Cir.1992); In re Morton-Norwich Products, Inc., 671 F.2d 1332.

[n.28]. Supra note 8. See also Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Bright Lighting, Inc., 376 U.S. 234 (1964); Bonito Boats v. Thunder Craft Boats, Inc., 489 U.S. 141, 156 (1989).

Note, there should be little question of preemption due to design patents as elements of a trade dress, because design patents focus on the elements themselves i.e. the nonfunctional or aesthetic elements of functional items, while trade dress focuses on the whole product including the functional elements. That is, since all trade dress contain functional elements and since design patents cannot contain functional elements, then trade dress protects different subject matter. For example, the design of an air intake on a car may be the subject of a design patent and therefore preclude its use by all others but the patent holder for 14 years (35 U.S.C.A. section 171). This does not mean that the entire car cannot be protectable as part of a trade dress. Even if every nonfunctional element of the car had a design patent on it, the "total image" of the car would still be protectable after the expiration of the patents (supra Section II). The difference would be that after the expiration of the design patents the elements that make up the trade dress would then be in the public domain. Therefore a competitor would be entitled to copy any number of those elements as long as the "total image" of the competitor's car would not cause a likelihood of confusion among relevant consumers (supra Section II). Therefore since a trade dress analysis focuses on subject matter, that is not covered by patent laws then there is little chance of preemption. Notwithstanding, if trade dress causes of action are brought under section 43(a) of the Lanham Act, which is a federal statute, they should not be preempted. See, e.g., Ferrari, 944 F.2d 1235, at 1241.

[n.29]. Abbott Laboratories, 971 F.2d 6, at 20.

[n.30]. Taco Cabana, 932 F.2d 1113, at 119 (citing Sicilia, 732 F.2d 417).

[n.31]. Id; see supra Section II.

[n.32]. In re Morton-Norwich, 671 F.2d 1332, at 1339.

[n.33]. See supra Section II.

[n.34]. See In re Morton-Norwich, 671 F.2d 1332, at 1339.

[n.35]. Fuddruckers, 826 F.2d 837.

[n.36]. Id. at 842, n. 7.

Note, it may be necessary to show more than one alternate trade dress to prove nonfunctionality. See, e.g., Coach Leatherware, 933 F.2d 162, at 170 ("Lanham Act protection does not extend to configurations of ornamental features which would significantly limit the range of competitive designs available.").

[n.37]. The idea is that such a distinction will overcome any misunderstanding that copyright law might preempt trade dress actions, because they focus on different subject matter. See supra note 26.

[n.38]. See, e.g., Computer Associates International, Inc. v. Altai, Inc., 23 U.S.P.Q.2d (BNA) 1241 (2nd Cir.1992).

[n.39]. Id.

[n.40]. Id.

[n.41]. Id.

[n.42]. See, e.g., Apple Computer, Inc. v. Microsoft Corp., 24 U.S.P.Q.2d (BNA) 1081 (DCNCalif.1992).

[n.43]. It has already been noted that if the trade dress itself is de jure functional then it would be unprotectable. See Section IV.

[n.44]. See supra section II.

[n.45]. The example of a click-on icon comes to mind. Click-on icons, because of the function for which the are designed are basically all alike at a source code level. But, as some of the commercially available GUI programs have proven, click-on icons can take on a variety of appearances and still serve the same function (i.e. a means of launching programs).

[n.46]. Note, commercially available elements are those elements that are obviously inexpensive enough to create and to be market and therefore offer examples of alternate trade dress configurations.

Also, if there is a need to show alternative methods, which Apple wishes to protect as trade secrets, then they can do so under Rule 26(c)(7) of the Federal Rules of Civil Procedure.

Also, to use the example of a click-on icon, Apple must show that there are large numbers of visual appearances of icons, which would not confuse consumers. For example, if the visual display was made into a grid of x number of boxes made from lines crossing the display both horizontally and vertically, then each box could be made into what would appear to be a three dimensional button. These buttons could be click-on icons that look nothing like those on a Macintosh. See note 45.

[n.47]. In re Morton-Norwich Products, Inc., 671 F.2d 1332, at 1341 ("It may also be significant that the originator of the design touts the utilitarian advantages through advertising.").

[n.48]. J. Stevens, concurrence, Two Pesos, 112 S.Ct 2753, at 2763 (citing New West Corp. v. NYM Co., Inc., 595 F.2d 1194, 1201 (9th Cir.1979)).

[n.49]. Id.

[n.50]. Jane C. Ginsburg, et al., Trademark and Unfair Competition Law: Cases and Materials, 350 (1991).

Note, these factors are known as the "Polaroid factors" because they originated in the landmark decision of Polaroid Corp. v. Polarad Elects. Corp., 287 F.2d 492 (2nd Cir.1961).

Note also, regardless of whether or not the court uses some variation of the Polaroid factors in determining likelihood of confusion, proof of intentional copying may be the key element in proving likelihood of confusion. See, e.g., Ferrari, 944 F.2d 1235, at 1243.

[n.51]. 15 U.S.C.A. section 1051 et seq. as amended by 15 U.S.C.A. section 1051 et seq., 100th Cong., 2nd Sess., 1988.

[n.52]. 15 U.S.C.A. section 1125(a) as amended by 15 U.S.C.A. section 1125(a), 100th Cong., 2nd Sess., 1988.

[n.53]. See, e.g., Fuddruckers, 826 F.2d 837, at 845.

[n.54]. See, e.g., Baniff Ltd. v. Federated Department Stores, 841 F.2d 486, 490-491 (2nd Cir.1988).

[n.55]. See, e.g., Taco Cabana, 932 F.2d 1113, at 1126.

Note, intentional copying of a trade dress may give rise to monetary damages. See, e.g., Taco Cabana, 932 F.2d 1113, at 1127. See also 15 U.S.C.A. section 1117.

Also, the placement of the defendant's trade name on the visual display does not alleviate the possibility of confusion as to association or approval, since such an analysis does not focus solely on the source of the goods. That is, that there can be confusion as to association without there being confusion as to source. Therefore, any injunction would at least have to use a disclaimer which states that the defendant's trade dress is of an independent origin from that of Apple's and that further there is no trademark association between the companies with regard to the software application.