

The Journal Of The Section Of Litigation American Bar Association

Litigation

online

Volume 31 No. 2, Winter 2005

This Brand Is My Brand: Litigating Product Image

by Natalie J. Spears and S. Roberts Carter III

For permission to reprint, write to Copyright Dept., American Bar Association, 321 N. Clark St., Chicago, IL 60610.
Copyright © 2005, American Bar Association. All rights reserved.
<http://www.abanet.org/litigation/home.html>

This Brand Is My Brand: Litigating Product Image

by **Natalie J. Spears** and **S. Roberts Carter III**

Corporate image and product brands are under siege in scenarios that have become all too familiar. Scores of knockoffs in the marketplace copy your client's famous, trademarked product name for women's handbags. Your client's buyer just discovered its innovative pink plastic bubble packaging for its new dolls is being copied substantially by a competitor. A 30-second television commercial during the Super Bowl touts a competitor's product as being ten times better and faster than your client's.

The return-fire response is typically an emergency trip to the federal court. Are you ready?

What follows are some lessons to consider on your way to the courthouse when litigating a case in which your client's product and image are at the heart of the matter. The take-away: When operating in the tangible and accessible world of consumer products and images, try not to think like a lawyer *all* of the time. Use some common sense. It works.

Our clients' businesses rise and fall on the strength of their products and, often, on the strength of the brands and images associated with those products. Although this reality is certainly intensified by today's image-driven, information-crazed culture, it is nothing new. The same situation existed long before Coca-Cola, Apple computers, or Google. Indeed, the practice of uniquely identifying an owner or business in the marketplace is almost certainly as old as commerce itself—think of branding cattle or signing works of art.

Not surprisingly, given their elementary importance to

business, the laws designed to protect brands and images also have deep historical roots. Trademark law as we know it first emerged out of the common law of England, dating back to as early as the mid-1500s as a tort of deceit claim. It arrived in the United States in the mid- to late-19th century. Originally designed to prevent the passing off of one merchant's goods by another, trademark law now is part of the broader rubric of unfair competition law, and has evolved to protect a wide range of methods used by businesses to identify their products, and their very corporate selves, in the marketplace. Today, arbitrary or fanciful names (e.g., Verizon and Exxon) or symbols (e.g., the Microsoft Windows logo) present strong corporate images and receive broad trademark and related trade dress protection. Even colors (think pink for Owens Corning insulation) and sounds (NBC's three-note chime, consisting of the notes G-E-C for its parent General Electric Company; or Harley-Davidson's engine roar) are protected as trademarks.

Power and Protection

Trademarks are the owners' pledge of consistent quality and a means for conveying a certain status to consumers, all of which helps businesses promote their products and services. Some marks are so powerful that they become part of the public vernacular; where the marks' owners neglect vigilance in enforcing their identity, the legal protections can self-destruct, rendering the trademark name a generic term for a whole category of products—*aspirin*, for example (although the mark *Aspirin* still is protected in Canada), or *escalator*, or *thermos*.

Trade dress law protects the product's total image and overall look and feel—those elements that can heavily influence the image or represent it in the consumer's mind. Trade dress

Natalie J. Spears is with Sonnenschein Nath & Rosenthal LLP in Chicago, Illinois. S. Roberts (Rob) Carter III, a former associate with Sonnenschein who co-authored the article while with the firm, is a law clerk to the Hon. Joan B. Gottschall in the U.S. District Court for the Northern District of Illinois.

can include the packaging, size, shape, color or color combinations, texture, graphics, or even particular sales techniques associated with a product. Well-known examples include the configuration and packaging for McDonald's Happy Meals, the "G" shape of the frame of a Gucci watch, and the interior motif and design of a restaurant. In fact, our firm once handled a trade dress case over women's dresses—no joke.

Legal protection for images does not stop there.

- False advertising laws are close kin to trademark and trade dress protection. They all belong to the family of unfair competition law and, of course, are designed to prevent the legitimizing of bogus images built upon false or misleading statements.
- Copyright protection now covers everything from product designs to advertising to website content. Overseas, a Dutch court recently granted copyright protection to a particular scent of Lancôme perfume. The court reasoned that the scent was not only measurable by the senses but also concrete and stable enough to be considered an "authored work" that deserved protection under copyright law against cheap knockoffs.
- Even patent laws have evolved to lend a helping hand to the image of products and services. For example, the U.S. Patent and Trademark Office has granted a number of design patents protecting articles such as the configuration of a wine bottle, the look of an athletic shoe, and even the Star Wars characters.

Developing from the 16th century tort of deceit all the way to the 21st century world of design patents for toy action figures, the law now provides many weapons for protecting product brands and image. But the one nonlegal, age-old item in the arsenal that lawyers sometimes overlook is common sense.

As Katherine Hepburn once claimed, "My greatest strength is . . . common sense. I'm really a standard brand—like Campbell's tomato soup or Baker's chocolate."

There is a special quality to image-driven product cases, perhaps because they are so tangible and relate to our own everyday lives as consumers. For that reason, using a little practical judgment often is worth as much as the usual fancy surveys and high-priced experts on likelihood of confusion, secondary meaning of trademarks, and the like. Now, we are not suggesting that you throw out the surveys and experts. They have become a necessary byproduct of the law in these cases. We simply advise that, in the initial rush and fervor of these cases (which typically start in the fast lane with emergency motions for temporary restraining orders and expedited discovery), you should not forget to take a step back and use some good, old-fashioned common sense.

Judge-as-Consumer

Human nature is shared by everyone. Judges, for example, whether they shop at Sears, Wal-Mart, Saks Fifth Avenue, or e-Bay, are consumers just like everyone else—juries are too. But intellectual property cases involving products often are won

and lost on the motions for temporary restraining orders and preliminary injunctions, long before the case ever reaches a jury. Because these requests at least in theory call for a prompt decision, the judge must quickly form a judgment about your client's image while evaluating the products at issue.

In fact, however, the judge likely is already familiar with your client's products or similar products and has a preconceived impression of your client's image. That is simply human nature. Even if the judge has not previously encountered the specific product, in the back of her mind she may well be assessing the products—and the image of the client associated with them—as a potential consumer as well as a jurist. Again, human nature. The judge therefore is likely to evaluate the product and your client's associated image from a slightly different vantage point than in a breach of contract case, an insurance indemnification dispute, or an ordinary business tort litigation.

There even will be times when the judge-as-consumer has an opinion that may reflect equally poorly on both parties' images. For example, during a client's preconference on a copyright injunction motion we brought to prevent a company from selling knockoffs of decorative wine glasses ("stems," to those in the business), the judge drolly remarked that our client's glasses were so ugly, he could not understand why anyone would want to buy them. Naturally, it was a bit disheartening to learn that the judge believed our client was injecting ugliness into the stream of commerce. But it clearly telegraphed his first reaction: What is the big deal? Where is the emergency? Who would want these glasses anyway?

Although the product is beloved to your client, the judge may not think it is the greatest—although most judges are not frank enough to say so. The commonsense moral: In almost all cases, assume from the get-go that the judge may have a negative or blasé view of your claim. To counter it, develop and emphasize compelling facts about, for example, the response of consumers to your client's product and its importance to your client's business.

For instance, several years back, we defended Skeleton Key, a rock band teetering on national success, and its then record label, Capitol Records, in a trademark infringement case over the band's name. It was no wild hunch to assume, as we did, that the judge had never heard of the band and might not be too excited about the name we sought to protect for their punk-rock look and eclectic style of music, which at times involved banging on pots and pans. In anticipation of this, our summary judgment papers were full of facts aimed at educating the judge about the practical importance of the name to our clients, who had just completed a tireless national tour promoting their latest release and were about to begin another tour to support their next one. Additionally, even though *Billboard* and *Rolling Stone* had covered our clients, we also specifically emphasized attention the band received in publications we imagined might be on the judge's desk, such as the *New York Times*. It worked. When we presented our motion, the judge telegraphed to opposing counsel his

obvious sympathy for our clients. Days later, we had a voluntary dismissal in hand.

In contrast are cases where the judge predictably is also a consumer of the products at issue. Here, too, the judge is likely to view the claim through a consumer's eyes. Take last July's potato chip lawsuit, for example, in which Chicago-based Jays Food, Inc., maker of Jays Potato Chips, brought a false advertising lawsuit against Texas-based giant Frito-Lay for claiming "Chicago prefers the taste of Lay's over Jays." The advertising claim was based on a survey, as are many comparative-ad claims. But, survey aside, most judges have eaten their share of potato chips and bring their own salty memories to bear in viewing such evidence. We therefore were not surprised when, in issuing a temporary restraining order, the judge found it was unfair that the participants in the shopping mall survey tests were not necessarily from Chicago and that the Jays chips were labeled as "unflavored" in the advertisements. The judge amusingly dubbed the labeling "not only unsavory but totally tasteless."

Again, there is a common-sense lesson to be learned. When designing surveys for claim-based advertising and certainly when backing them as scientific proof, consider that the judge likely has consumed the product and, from a consumer perspective, can appreciate and will likely be sensitive to the

If you are wearing the white hat, keep your hat clean.

effects of the surveys' participants, labeling, presentation, and other aspects. The same can be said of the advertisements themselves. Be realistic and think of the judge-as-consumer when presenting your case.

One common tool for predicting a judge's or jury's impression of your client's product and image is market research. Typically, this means hiring the increasingly pricey expert to conduct controlled focus groups or survey testing aimed at getting a finger on the average person's pulse in reaction to your claims. But market research need not be expensive to be useful.

First of all, your client already may have some research handy. Before companies go to market with a new product or run a new advertising campaign for an existing product, they often test their themes and product image with focus groups. This research commonly is captured on videotape or at least in written summaries. Even if not directly related to the issues in the litigation, this material may offer tremendous insight into how people feel about the claims being made or about the image of the product.

Second, it is often helpful to ask around and learn about colleagues' experiences with the product. This research, although

not scientific, is often free or at worst pegged at the price of a cup of Starbucks coffee, and it can be extremely helpful in anticipating a judge's initial human reaction to the product at issue. In some cases, it may even turn into evidence.

A great use of unpaid "market research" at our firm came during a trademark infringement lawsuit brought by Blue Cross Blue Shield (BCBS), which has a "BlueCard" health-care services program and had registered a trademark for the name. When our client, American Express Company, launched a new credit card with smart-chip technology and called it "Blue from American Express," BCBS objected. Litigation by BCBS followed, designed to halt the American Express ad campaign and all marketing.

As many trademark lawsuits do, the litigation came during the critical product-introduction period, when investments are on the line and executives hold their breath as they await results. The American Express ad campaign had just begun and featured a silver credit card with a square, blue hologram center being pulled, twisted, and stretched, accompanied by classical music. The stakes were high. Yet the preliminary injunction request left little time for fancy discovery.

One of the more powerful arguments for American Express was that numerous other credit card providers offer cards that are blue and that "blue" is not a unique identifier of BCBS. This evidence sprang not from months of discovery or an expensive expert survey but rather from a quick Internet search by one of our colleagues, who summarized it in an affidavit for the court. As a result, we presented examples of a number of different blue cards to the court. When the judge denied BCBS's preliminary injunction motion, he relied on the fact that the many blue cards "tend to suggest that the Blue Card mark is not all that strong." Victory—and we didn't even need to buy anyone a cup of coffee. *See Blue Cross & Blue Shield Ass'n v. American Express Co.*, No. 99 C 6679, 1999 WL 1044825 (N.D. Ill. Nov. 16, 1999).

Another commonsense tool available is the client's overall goodwill with the public—its "white hat." Many consumers feel a special affinity with certain products, spokespersons, and companies based on their images in the marketplace. But inside the four walls of a courtroom, the law requires judges and juries to check their preconceived notions and feelings at the door. In cases where a product's image is not at issue, judges are careful to keep sentimental and irrelevant evidence out of the case. Contrast that with cases where the product's image is front and center—the opportunities to capitalize on a positive image of your client's product or a negative image of your opponent's generally are fair game. In those cases when both a product and product image are at issue and your client has a stellar image, use it to your advantage and keep it intact.

Not too long ago we handled a case for the Chicago Tribune Co., publisher of the *Chicago Tribune*, involving a trademark infringement lawsuit over promotional memorabilia designed to promote the newspaper's image and memorialize its coverage of historic moments. The memorabilia included everything from paperweights to sofa blankets to T-shirts carrying a repro-

duction of the front page from June 15, 1998—the day after the Bulls won their sixth NBA championship—with the headline “The Joy of Six,” a wordplay on the *Joy of Sex* book series.

The memorabilia were a big hit with consumers at the *Tribune* store in Chicago. They had nearly sold out by the time the lawsuit arrived claiming that the memorabilia violated the plaintiff’s recent federal trademark registration for “Joy of Six,” which the plaintiff had registered to use for her own line of Joy of Six T-shirts, among other things. Litigation ensued. See *Packman v. Chicago Tribune Co.*, 267 F.3d 628 (7th Cir. 2001).

We wore the proverbial white hat from the start of the lawsuit, given the positive image and strong brand associated with the *Tribune*. We used it to our advantage by focusing on the strength of the newspaper’s masthead and the “feel good” nature of previous *Chicago Tribune* memorabilia using historic front pages to promote the paper, including the Chicago blizzard of 1999, Sammy Sosa’s consecutive 60-plus home run seasons, and the Chicago Bears’ 1986 Super Bowl win.

We also were able to contrast this positive image by portraying the plaintiff as an alleged trademark squatter who had not invested time and energy into building an image and brand for the purported Joy of Six mark for T-shirts. We argued that she was just looking for a quick buck from the Chicago Tribune Co., which had not used Joy of Six as a trademark in any event. The plaintiff and her husband tried to counter this image by emphasizing their excitement and energy for their product. The plaintiff’s husband even wore one of their logo shirts to his deposition—a move that backfired somewhat because it had not been produced in discovery, and we promptly took a Polaroid snapshot of it.

In winning the case, we not only used our client’s wholesome image to our advantage but also took steps to ensure we did not lose that image. This leads to our next point: When starting with a product image that is on the side of the angels, you must try to stay on that side. It is always surprising to see lawyers with a stellar product image mess up a good thing by making decisions in the litigation that tarnish the image. Examples include overly aggressive, Terminator-style discovery tactics or even sloppy discovery productions that can result in contempt proceedings. All of this can engender a negative opinion of the client. Again, common sense dictates that, if you are wearing the white hat, take the high ground and keep your hat clean.

Dilution and Infringement

Nowhere is the image of a product or service more in play than in a trademark dilution case. Owners of famous trademarks for their products—*e.g.*, Coca-Cola, Levi’s, American Express—are protected by the Federal Trademark Dilution Act, 15 U.S.C. § 1125(c), against use of the same famous mark (or a similar mark) by third parties on noncompeting products. Although such third-party use is not likely to confuse consumers or constitute traditional trademark infringement, it nevertheless can diminish the ability of a famous mark to distinguish the product. Depending on the nature of the third-party product, that use also can tarnish a famous

mark by a negative, illegal, immoral, or controversial association. Many states have similar trademark dilution laws.

The Supreme Court’s decision in the *Victoria’s Secret* case in March 2003 put a damper on federal trademark dilution protection. The Court imposed a higher burden that requires famous owners to prove “actual dilution” as opposed to a “likelihood of dilution” from the third parties’ trademark use. *Mosley v. Secret Catalog, Inc.*, 537 U.S. 418 (2003). Trademark dilution claims, however, still are viable.

Since the *Victoria’s Secret* decision, some of the lower courts have accepted arguments by creative lawyers to maneuver around the actual dilution standard. In particular, where identical marks are at issue, some district courts have allowed circumstantial evidence of dilution in place of direct evidence. See, *e.g.*, *General Motors Corp. v. Autovation Technologies, Inc.*, 317 F. Supp. 2d 756 (E.D. Mich. 2004); *7-Eleven, Inc. v. McEvoy*, 300 F. Supp. 2d 352 (D. Md. 2004). Also, do not forget about the possibility of ancillary state law dilution claims, which often have lower burdens of proof on various elements. For instance, in *Advantage Rent-A-Car, Inc. v. Enterprise Rent-A-Car Co.*, 238 F.3d 378 (5th Cir. 2001), the Fifth Circuit upheld dismissal of the Federal Trademark Dilution Act claim, based on Enterprise’s slogan, “We’ll Pick You Up,” but remanded the case to consider applicability of Texas and Louisiana antidilution statutes requiring only a showing of distinctiveness rather than fame of the mark.

But you might want to hang on to a dilution claim because it can open the door for certain helpful evidence—particularly with a tarnishment claim. Although the standard of proof now may be higher, the ability to argue dilution can significantly help in casting the positive image of your client’s product, or the negative image of your opponent’s product, in an advantageous manner. For example, when two products using the same marks are competitive to some extent but not exactly shelf mates in aisle 12 at the store, using a trademark dilution theory can help further demonstrate the harm involved. Similarly, when a dilution-by-tarnishment claim is viable, including such a claim can ensure an open door to presenting evidence of negative associations with the defendant’s product at trial that otherwise might create evidentiary battles in a plain infringement case.

For example, before the *Victoria’s Secret* decision, we brought a trademark infringement and dilution case on behalf of the Big Ten intercollegiate athletic conference to protect its famous Big Ten trademark. In our litigation, an independent ticket broker was using the Big Ten mark in his company name, Big Ten Worldwide, and on promotional materials when he sold tickets to Big Ten events at more than face value. As is typical, the ticket broker tried to portray himself as a little guy versus the big, overreaching corporation—a small business owner who for a number of years had used the Big Ten mark because he attended a Big Ten-member school. When discovery showed the defendant had a multimillion-dollar business, however, and that Michigan, the state where he operated his business, prohibited ticket scalping by law, the

little-guy theme wore off.

We prevailed on both the trademark infringement and trademark dilution claims at trial. We had strong trademark infringement claims and did not necessarily need the dilution claims to receive injunctive relief. The dilution claim, however, which was a dilution-by-tarnishment claim, allowed us to sing the praises of our client's image as the beloved, wholesome, Midwestern college-sports conference, and to contrast that with the defendant's image as a ticket scalper conducting an arguably illegal business. The ability to contrast the parties' images had an important impact in setting the stage and allowing us to take full advantage of our client's positive image. Although some of this evidence might have come in had we had only a trademark infringement claim, even under Federal Rule of Evidence 403 standards, our dilution claim locked in our ability to present most of the evidence about the negative associations with the defendant's product.

Another potentially overlooked innovation in product-image litigation is your own computer software. These cases require eye-catching visual depictions of the brands and images at issue. The percentage of lawyers who still do not know how to turn on their PCs is shrinking rapidly. Today's average personal computer has the ability to convey a wealth of information about your client's image through graphics alone. Now you can easily reproduce color images of your client's mark or product to submit as exhibits to your pleadings and also, with the push of a button, embed images directly in the pleadings themselves—which we highly recommend. Why wait for the exhibit at the end of the document when images can be dropped in right next to the sentence that says, "The defendant's trademark substantially copies the plaintiff's mark"?

In a recent litigation involving the design of a gourmet coffee-maker, we included color images of the competing coffee-makers between lines of the complaint itself. That way, the judge did not have to flip back and forth to exhibits to understand the issues. It provided instant communication—simply and powerfully.

The courts also have access to high-level computer technology. If the judge or law clerk has minimal computer savvy, which many do, computer technology can be used to your benefit. For image-driven product cases, and especially in cases involving television or radio commercials, go ahead and submit pleadings the old-fashioned way, but consider also submitting them on CD-ROM. This technology allows the reader to double-click easily and link directly to evidence of the various images, video, and audio referenced in the pleadings. Of course, setting up a linked system of documents for the court is probably beyond the technical acumen of most litigation attorneys. Fortunately, law firm IT departments and specialized presentation companies are available to help create such interactive pleadings.

The impact of the Internet on almost every client's image would be difficult to overstate. The vast majority of clients now have their own websites to support their image and pro-

vide information to consumers. The main difference between this and more traditional means of communication in the marketplace is that the Internet is much more interactive. It allows for a true exchange of information. The audience for some forms of online communication can easily set up a website and become powerful speakers in their own right.

One of the most effective forms of communication is the Web log, or "blog." A blog is essentially an easily updateable, online journal that allows its authors to quickly disseminate information on the Internet. Blogs discussing almost every conceivable topic have become a significant source of information for Internet users, and they are now becoming a viable alternative to traditional media outlets. In fact, the August 2004 issue of *Wired* magazine, calculating the influence of various websites, rated the "Instapundit" blog operated by law professor Glenn Reynolds as more influential than the websites of Fox News, MSNBC, *USA Today*, PBS, and the White House. See www.instapundit.com.

What this has to do with litigation and your client's image is that blogs offer their own spin on particular issues and often

Blogs are becoming a significant source of information for Internet users.

can be another source of inexpensive market research. Law-related blogs on a wide variety of legal subjects—sometimes referred to as "blawgs"—are especially popular. If your case is in any way novel or interesting, there is a safe bet it will make the blog circuit. If the case is significant enough, it may even get its own dedicated blog, such as the Groklaw blog covering all aspects of the SCO versus IBM litigation involving intellectual property rights to the Linux computer operating system. See www.groklaw.net.

In addition, the ease of blog publishing, coupled with free electronic access to judicial records, means court filings that traditionally were read by only a handful of people now have a potentially unlimited audience. Correspondence likewise can end up becoming public. If the product is high profile or controversial, do not be surprised to see your cease-and-desist letters get a response not only from opposing counsel but also from scores of bloggers once it is posted on the Internet. The feedback is interesting, if not amusing, and sometimes downright insightful.

Not surprisingly, blogs are beginning to appear throughout the litigation landscape. One interesting emerging trend

is the sponsored blog. For example, lawyers for PeopleSoft, Inc., operate a blog covering antitrust litigation against Oracle Corp., which is attempting a hostile takeover of PeopleSoft. *See* www.peoplesoft.com/corp/en/news_events/news/justice.jsp. Additionally, both Martha Stewart and Michael Jackson have official blogs that provide information about their activities as well as their lawsuits. *See* www.marthataalks.com, www.mjsource.com. Stewart's blog has a section containing links to trial documents and press releases, while Jackson's features "breaking news" that includes the litigation and a section that features profiles of every member of his legal team. In other interesting blog developments, TalkLeft, an online blog source for liberal coverage of crime-related political news, started by Denver lawyer Jeralyn Merritt, actually received press credentials to blog the Kobe Bryant rape trial. *See* http://talkleft.com/new_archives/007590.html.

Protecting clients' intellectual property requires some degree of Internet savvy.

Each lawyer and client will of course have to decide whether a blog to advocate on behalf of the specific case is advisable. Lawyers contemplating doing so should of course be aware of the implications of making statements about the client as an agent of the client. They also need to consult local rules and ethics canons involving public communication on aspects of the litigation.

Of course, in the 21st century, litigators charged with protecting their clients' intellectual property and product images need some degree of Internet savvy themselves. A warning may seem like common sense (and it is), but in the rush of the moment, Internet evidence can be overlooked. Surf the web when preparing your arguments in a case involving product brands and images. Information you find about the products at issue and the websites promoting them may delight you and help win the case.

One helpful online evidentiary tool for litigators is the "wayback machine." The availability of inexpensive data storage during the past several years led to the creation of the Internet Archive, available at www.archive.org. Since 1996 the Internet Archive has been indexing and storing a substantial number of websites. Through the use of the archive's Wayback Machine service, visitors can access web pages that have been stored in the archive at various points in the past.

For example, you can visit the whitehouse.gov website from 1996, when the page served primarily as a means of accessing copies of press releases, or see the eBay website from 1997, with its link to the new "AuctionWeb." For the meticulous litigator, the archive can also help you determine whether the opposing side altered its website.

The site also can be used as evidence when an opponent engages in conduct that arguably is permissible in the present but may not have been in the past. Earlier this year, we were involved in a dispute between two financial commentators, one of which, the plaintiff, ran a website containing variations on our client's name in the site's meta-tags. Meta-tags contain information about a web page, including lists of keywords that represent its content. Although not displayed on the page itself, the meta-tag information is used by Internet search engines to determine whether the site's content fits with a search request. The commentator website using the name of our client in its meta-tags, we believed, was trying to attract visitors to that site.

After the lawsuit was filed, however, the use of our client's name arguably became reasonable. The site in question featured news about the lawsuit involving our client, so it made some sense to "describe" the website to search engines as being related to our client. But, after closer inspection using Internet Archive, it became apparent that the other commentator had been using our commentator's name in its website's meta-tags to attract visitors to the site long before the dispute started—and long before content even remotely related to our client ever had appeared on the website. We filed a counterclaim alleging multiple harms arising out of what we believed was an unfair use of our client's name and image on the web, including unfair competition and violations of the Illinois Right of Publicity Act. The case settled, depriving the court of the opportunity to examine these exciting issues of first impression in Illinois.

The lesson here, of course, is that it is important to keep in mind that new issues and novel claims involving the client's image and products arise all the time as technology evolves. It pays to stay tuned in. Smart Internet searches of both present and past content can pay huge dividends when protecting your client's image and products in general, and specifically online.

On a final note, one rewarding aspect of litigating cases involving product image is that sometimes you can see the fruits of your labors with your own eyes. With regard to the case of the "ugly" wine glasses discussed above, not long after we had halted further sales by our opponent, one of us returned home to visit family on a holiday—only to find the dinner table festively adorned with a set of eight of our client's hand-painted stems. The glasses had been purchased by the family matriarch and, contrary to the judge's view, were considered "gorgeous" by all of the ladies in attendance—proving once again that beauty truly is in the eye of the beholder. ▣