

TRADE DRESS IN THE AGE OF E-COMMERCE: THE CHALLENGE OF PROTECTING THE “LOOK AND FEEL” OF WEBSITES AND MOBILE APPS

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INTRODUCTION

E-commerce continues to define the marketplace of the twenty-first century, and few businesses can operate successfully without participating in it. However, being accessible through the Internet is not enough. Businesses must entice people to visit their websites, stay on their websites, and return to their websites. Therefore, most businesses not only need to have desirable products, services, and content, but they also must create

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memorable and enjoyable user experiences. Additionally, as the use of mobile devices continues to transform how we shop and stay connected, many retailers and service providers have complemented their web and social media presences by offering applications for these devices (“apps”), which, to be maximally effective, should create a user experience that is consistent with what a user would find on a website or a social media platform.

A user experience can be created in part through the “look and feel” of a website or an app.¹ However, when discussing the “look and feel” of a website or an app, one must remember that the “look and feel” of digital environments is not synonymous with the content of them, and it is possible for competitors to create similar-looking websites and apps without copying content.² Consequently, although e-commerce vendors and information providers can rely in part on copyright protection to protect their creativity, copyright protection alone is often not sufficient to stop a competitor from trying to profit from the creativity of the “look and feel” that another business has created. Because of the limits of copyright protection, these stakeholders have begun to look to trade dress law in order to protect against unauthorized replications of users’ experiences.³ This article provides a brief background on trade dress law, a discussion of the early application of trade dress law to websites, and a survey of how courts have more recently applied the doctrine of trade dress

¹ See Emil Lamprecht, *The Difference Between UX and UI Design-A Layman’s Guide*, CAREERFOUNDRY, <http://blog.careerfoundry.com/ui-design/the-difference-between-ux-and-ui-design-a-laymans-guide/> (last updated Feb. 14, 2017) (noting the components of an overall user experience, which includes an interface design that creates the aesthetic “look and feel” of a website).

² See Claudia Ray & Brendan T. Kehoe, *Defining “Look and Feel” Infringement of Web Sites*, LAW360 (Dec. 2, 2008), <https://www.law360.com/articles/78774/defining-look-and-feel-infringement-of-web-sites> (discussing the lack of copyright protection available for website formatting because only content is actionable under copyright laws).

³ Early in the evolution of the applicability of trade dress protection to websites, litigants and commentators postulated that copyright law might preempt trade dress protection. However, courts have universally held this not to be the case, provided that holders of purported trade dress rights plead a “look and feel” that does not fall within the Copyright Act. See, e.g., *Sleep Science Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *4–*5 (N.D. Cal. May 10, 2010) (holding that “[c]ourts have ‘long limited application of the Lanham Act so as not to encroach on copyright interests.’”); see also J. Scott Anderson, *Painstaking Semantics: Selecting Website Trade Dress Elements to Survive a Copyright Preemption Challenge*, 7 J. MARSHALL REV. INTELL. PROP. L. 97, 97, 103–04 (2007) (discussing the limitations of copyright protection, as applied to websites, and the shift to focusing on trade dress rights for website designs).

infringement to websites and apps.

TRADE DRESS LAW

“‘Trade dress’ refers to the design or packaging of a product” or service environment that is sufficiently distinct to cause consumers to identify the product or service with its manufacturer or source.⁴ Examples of trade dress rights include the atmosphere of a restaurant, a bottle design, and a smart phone design.⁵ Thus, it is a right that, when properly cultivated, may protect the image and overall appearance of a product.⁶

Trade dress rights are enforceable under both state and federal law, but typically, holders of these rights look to the Lanham Act as a source of protection.⁷ Additionally, one should note that doctrinally, trade dress rights differ from trademark rights in that trade dress is defined as “the totality of the elements, and the overall impression made by the identified elements,” rather than being defined as an individual element, such as a word or symbol,

⁴ See *Shire U.S. Inc. v. Barr Labs. Inc.*, 329 F.3d 348, 353 (3d Cir. 2003) (“‘Trade dress’ refers to the design or packaging of a product which serves to identify the product’s source.”); see also *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 28 (2001) (“The design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source.”); see also *Qualitex Co. v. Jacobson Products. Co., Inc.*, 514 U.S. 159, 162–63 (1995) (noting that section 43(a) of the Lanham Act protects against trade dress infringement where the quality is so distinctive that it identifies its source automatically); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992) (noting that trade dress includes anything “reflecting on the total image of the [business].”); see also *LeSportsac, Inc. v. Kmart Corp.*, 754 F.2d 71, 75 (2d Cir. 1985) (noting recent findings that the design of a product may be protected under the Lanham Act where the packaging distinguishes it from other products).

⁵ Nicholas DiMarino, Note, *Cutting Out the Middleman: Why “Look and Feel” Should be Ignored in Trade Dress Law*, 88 ST. JOHN’S L. REV. 1163, 1166 (2014).

⁶ *Two Pesos, Inc.*, 505 U.S. at 764 n.1; *Mana Products, Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d 1063, 1068 (2d Cir. 1995) (“The term trade dress refers to how a product looks, its total image, or its overall appearance.”).

⁷ See 15 U.S.C.A. § 1125(a)(1) (West, Westlaw through P.L. 112–190 approved 10/5/12) (noting that Section 43(a) of the Lanham Act provides that anyone who “uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which . . . is likely 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 likely to be damaged by such act.”); see also *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1134 (N.D. Cal. 2014) (“The definition of the actionable elements in Section 43(a) has been held to include trade dress.”).

as is the case in trademark law.⁸ Thus, these rights can be more difficult to define and to acquire than trademark rights.

The United States Patent and Trademark Office (“USPTO”) will accept applications for the registration of trade dress rights for e-commerce sites, but one is hard-pressed to find applicants who invest the time or resources to pursue these types of registrations, or if they have applied for these types of trade dress rights, ones that have been successful.⁹ This is understandable. As one can appreciate, website owners are reluctant to go through the exercise of applying for the registration of trade dress rights for their websites and apps because the demands for establishing distinctiveness are onerous.¹⁰ Moreover, unlike when creating a new brand, owners and operators of websites and designers of apps rarely think about trade dress protection until their creativity has been copied by another party.¹¹ Consequently, when enforcing trade dress rights, owners and operators of websites and designers of apps typically do so under the provision of the Lanham Act that allows for the enforcement of unregistered trade dress rights.¹²

⁸ *Am. Beverage Corp. v. Diageo North Am., Inc.*, 936 F. Supp. 2d 555, 595 (W.D. Pa. 2013); *see Rainforest Cafe, Inc. v. Amazon, Inc.*, 86 F. Supp. 2d 886, 894 (D. Minn. 1999) (“[W]hen evaluating a claim of trade dress infringement, the Court must examine the trade dress as a whole, considering the totality of the elements.”).

⁹ *See, e.g.*, U.S. Trademark Application Serial No. 86/616,044 (filed Apr. 30, 2015) (showing an unsuccessful trademark application for trade dress rights); *see also* U.S. Trademark Application Serial No. 87/089,083 (filed June 30, 2016) (showing an example of a trademark application for trade dress right protection that was not initially successful, but has since been approved).

¹⁰ *See* 15 U.S.C. § 1052(f) (2006) (providing for the registration of a mark distinctive in commerce for at least five years); *see also infra* note 14 (discussing website evolution and the burdensome task of registering a mark). One can imagine that, over time, applicants who have maintained their websites or apps for at least five years would try to register their trade dress rights based on acquired distinctiveness. However, if the websites or apps evolve too much over time, this avenue would become unavailable. 15 U.S.C. § 1052(f).

¹¹ *See* Tamara A. Miller, *Hey, I Know that Look! Maximizing Trade Dress Rights Before Infringement*, LEYDIG, VOIT & MAYER, LTD. (Oct. 2008), http://www.leydig.com/publications/articles_publications-23 (noting that, despite its importance, most companies do not take proactive measures to protect against trade dress infringement); *see also* Ben L. Wagner et al., *The Law that Protects the Appearance of Your Website*, MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC: TRADEMARK ADVISORY (Apr. 15, 2011), <https://www.mintz.com/newsletter/2011/Advisories/1032-0411-BOS-TRA/web.htm> (noting that technological advances and cyber strategies make protecting a website brand more difficult, but that trade dress protection is important from the beginning).

¹² *See* 15 U.S.C. § 1125(a)(1) (providing the basis of a civil action for trade dress infringement without requiring the registration of a trade dress).

THE RISE OF THE FOCUS ON THE “LOOK AND FEEL” OF A WEBSITE

The efforts to enforce trade dress rights in websites and apps began more than a decade ago.¹³ However, it appears that over the past ten years, an increasing number of litigants have been trying to prevent the unauthorized creation of websites, and, more recently, competing apps that they believe are too similar to their own designs.¹⁴ In these cases, the parties that purport to have trade dress rights have been instituting legal actions that allege trade dress infringement under the Lanham Act.¹⁵ Courts have agreed that websites and apps are protectable under trade dress law, but they have set the bar relatively high for a party to prevail in this cause of action.¹⁶

The analysis of whether an e-commerce design or digital presence qualifies for trade dress protection, and whether trade dress rights have been infringed, is framed in terms of whether the “look and feel” of a design merits trade dress protection and if so, whether the trade dress has been infringed.¹⁷ In a pair of now seminal cases, two courts ushered in an era of assertions of violations of trade dress rights in websites and provided the foundation for extending these claims to apps.

First, in 2007, in *Blue Nile, Inc. v. Ice.com, Inc.*,¹⁸ Judge Lasnik of the United States District Court for the Western District of Washington considered what was then a novel trade dress issue: whether trade dress applied to the “look and feel” of websites.¹⁹ Judge Lasnik pulled the phrase “look and feel” from a Ninth

¹³ See e.g., *Faerge & Beauty*, *infra* note 21.

¹⁴ See Kristen McCallion & Nancy Ly, *Protect a Distinctive Website with Trade Dress Law*, LAW360 (Mar. 31, 2014), <https://www.law360.com/articles/516269/protect-a-distinctive-website-with-trade-dress-law> (noting an increase in favorable case law in the realm of trade dress protection, and that trade dress infringement litigation is a promising alternative to copyright infringement actions).

¹⁵ See *Express Lien Inc. v. Nat'l Ass'n of Credit Mgmt.*, No. 13-3323, 2013 WL 4517944, at *1–2 (E.D. La. Aug. 13, 2013) (exemplifying a website trade dress infringement action under the Lanham Act based on similar website design).

¹⁶ See DiMarino, *supra* note 5, at 1176–77 (discussing the fact that claimants cannot simply assert general “look and feel” claims, but must specify the elements of their website design that are at issue).

¹⁷ This approach for analyzing trade dress issues for websites is not without its critics. *Id.* at 1187 (“Allowing plaintiffs to allege that the overall ‘look and feel’ of their websites should be protectable trade dress ‘raises the danger of overprotection, with resulting anti-competitive injury to competitors,’ by giving plaintiffs a chance to get unregistered protection for generic designs.”).

¹⁸ 478 F. Supp. 2d 1240 (W.D. Wash. 2007).

¹⁹ *Id.* at 1246.

Circuit case that defined a user interface as the look and feel of a computer program and in general, referred to “the design of the video screen and the manner in which information [was] presented to the user.”²⁰ The Ninth Circuit had used the phrase “look and feel” with respect to copyright rights, and prior to Judge Lasnik’s decision, the characterization of a website in terms of its “look and feel” had similarly been used to describe copyright rights.²¹ Ultimately, he concluded that more factual development of the plaintiff’s novel trade dress theory was necessary before the court would consider the conclusive disposition of the claim.²² Consequently, he denied a motion to dismiss the claim.²³

Three years after *Blue Nile*, in *Conference Archives, Inc. v. Sounds Images, Inc.*,²⁴ the United States District Court for the Western District of Pennsylvania took the position that the “look” portion of the “look and feel” of a website may be thought of as comprising features such as a website’s design layout, including colors, layouts, type cases, and shapes, whereas the “feel” portion of the “look and feel” of a website may be thought as comprising the interface design, which refers to how a user interacts with the functionality of the website.²⁵ Thus, the “feel” may be thought of as dynamic navigation elements such as buttons, boxes, menus, and hyperlinks.²⁶

Subsequent to *Blue Nile* and *Conference Archives*, courts have generally focused on the “look and feel” of a website to determine whether trade dress rights exist, and if so, whether they are

²⁰ *Id.* at 1244–45 (citing *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 n.3 (9th Cir. 1989)).

²¹ *See, e.g.*, *Peri Hall & Assocs., Inc. v. Elliot Inst. for Soc. Scis. Research*, No. 060202CVWGAF, 2006 WL 742912, at *3 (W.D. Mo. 2006) (discussing the plaintiff’s case as one under copyright law); *see also* *Faegre & Benson LLP v. Purdy*, No. 03–6472(MJD/JGL), 2004 WL 167570, at *1 (D. Minn. 2004), *aff’d* 129 Fed. Appx. 323, 325 (8th Cir. 2005) (finding trade dress infringement of the plaintiff’s web pages without providing a substantive analysis of the issue).

²² *Blue Nile, Inc.*, 478 F. Supp. 2d at 1243.

²³ *Id.*

²⁴ No. 3:2006–76, 2010 WL 1626072 (W.D. Pa. 2010).

²⁵ *See id.* at *6, *14 (discussing the novelty of the assertion of trade dress rights as late as 2010); *see also* *Salt Optics, Inc. v. Jand, Inc.* No. 10-0828 DOC (RNBx), 2010 WL 4961702, at *5 (C.D. Cal. Nov. 19, 2010) (“Intellectual property claims surrounding the overall appearance of a website present relatively novel issues.”).

²⁶ *See Conference Archives, Inc.*, No. 3:2006–76, 2010 WL 1626072, at *14 (discussing how “look and feel” may include the interactive elements on a website).

infringed.²⁷ However, case law has neither further elaborated on what constitutes the “look and feel” of a website nor provided meaningful guideposts for evaluating the strength of any such asserted trade dress right. Instead, case law has danced around the issue, for example, contrasting the rights that are protected with copyright rights.²⁸

Perhaps most telling is that in *Conference Archives, Inc.*, in which the court provides the most detailed suggestion of a possible standard, the court noted that many litigants had tried to define the “look and feel” of a website, and subsequent to *Conference Archives, Inc.*, no court had adopted its framework or proposed a better one to be adopted.²⁹ Other courts have noted the inherent challenge of pinning down a trade dress for a website because the features are not necessarily static.³⁰ Unfortunately, this reaffirming of a problem is hardly of much use to potential litigants. Consequently, one is left with the sense that determining how to analyze the “look and feel” of an e-commerce experience could, without careful attention by a trier of fact, become an exercise akin to going through Lewis Carroll’s looking glass, because there is no reference point by which to define these trade dress rights.

²⁷ See, e.g., *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1136 (N.D. Cal. 2014) (“The Court finds that the ‘look and feel’ of a web site can constitute a trade dress protected by the Lanham Act.”); *Parker Waichman LLP v. Gilman Law LLP*, No. 12–CV–4784(JS)(AKT), 2013 WL 3863928, at *4 (E.D. N.Y. July 24, 2013) (“[A] few district courts in other circuits have recognized that a website’s ‘look and feel’ can constitute a protectable trade dress. . . .”); *Salt Optics, Inc.*, No. 10-0828 DOC (RNBx), 2010 WL 4961702, at * 5 (“Precedent from around the country, however, indicates that a website’s total ‘look and feel’ can constitute a protectable trade dress.”); *Sleep Science Partners v. Lieberman*, No. 09–04200 CW, 2010 WL 1881770, at *5 (N.D. Cal. May 10, 2010) (“Courts have concluded that a website’s ‘look and feel’ could constitute protectable trade dress. . . .”); *Conference Archives, Inc.*, No. 3:2006–76, 2010 WL 1626072, at *14 (discussing the issues in identifying whether a website’s “look and feel” has indeed been infringed upon).

²⁸ See, e.g., *Gmes, LLC v. Line of Sight Communications, Inc.*, No. 2:16–CV–04085-NKL, 2016 WL 3566254, at *3 (W.D. Mo. June 27, 2016) (stating how the “look and feel” of a website is not protected by Copyright Act, but that components of a website could contain elements that are subject to copyright protection).

²⁹ See *Conference Archives, Inc.*, No. 3:2006–76, 2010 WL 1626072, at *7 (proposed definitions include: (i) “all of the visual or graphic elements and features that contribute to the site’s overall impression or ‘gestalt;” (ii) “the visual screen display and the command buttons or icons used for navigating the site;” and (iii) “the distinctive use of text, graphics, colors, sounds and/or movements.”).

³⁰ *Salt Optics, Inc.*, No. 10-0828 DOC (RNBx), 2010 WL 4961702, at *5.

TRADE DRESS AND APPS

While websites continue to provide a portal through which customers partake in e-commerce, increasingly apps are becoming the means by which consumers shop and interact with vendors and service providers.³¹ Similar to websites, each app has the potential to have a unique “look and feel,” and thus courts have used the same language to analyze claims of trade dress infringement of apps that they have used to analyze allegations of infringement of trade dress rights in websites.³²

For example, in *Arcsoft, Inc. v. Cyberlink Corp.*,³³ the plaintiff took the position that its app for self-portraits (“selfies”) was entitled to trade dress protection.³⁴ Analogous to the actions of litigants in many of the cases cited above, the plaintiff alleged that its app was entitled to trade dress protection under the Lanham Act.³⁵ In its complaint, the plaintiff provided a detailed description of the elements that formed its trade dress: unfortunately, the description included many features that were functional.³⁶

The defendant filed a motion to dismiss, and in response, the plaintiff tried to recharacterize its trade dress without reference to functional features.³⁷ The plaintiff’s response did not solve its problem of having filed a complaint that contained functional elements in its description of its trade dress.³⁸ The court determined that the very act of changing the description was a “shifting sands approach” that in and of itself failed the requirement of providing the defendant with adequate notice through the complete recitation of the concrete elements of an alleged trade dress.³⁹ The court granted the motion to dismiss; however, the plaintiff’s definitional mistake was not fatal because the court granted the motion to dismiss with leave to amend.⁴⁰

In another app trade dress case, *Diamond Foods, Inc. v. Hottrix*

³¹ Andrew Meola, *Shopping App Usage is Rising, but Retailers Still have a Glaring Problem*, BUS. INSIDER (June 9, 2016), <http://www.businessinsider.com/shopping-app-usage-is-rising-but-retailers-still-have-a-glaring-problem-2016-6>.

³² Isaac Winer, *Dress Your App Smartly – Court Upholds Novel Trade Dress Theory*, L. BLOG – BUS. L. & LITIG. (May 13, 2016), <https://ihwlaw.me/2016/05/13/dress-your-app-smartly/>.

³³ 153 F. Supp. 3d 1057 (N.D. Cal. 2015).

³⁴ *Id.* at 1057.

³⁵ *Id.*

³⁶ *Id.* at 1069.

³⁷ *Id.* at 1067, 1069.

³⁸ *Id.* at 1069–70.

³⁹ *Arcsoft, Inc.*, 153 F. Supp. 3d at 1069–70.

⁴⁰ *Id.* at 1070.

LLC,⁴¹ the plaintiff had released a free app in the “Food & Drink” category on app stores.⁴² The defendant had released a different app that constituted what it described as “[h]ilarious gags and mystifying tricks” in the “Games” category of app stores.⁴³ In a counterclaim, the defendant alleged that its trade dress consisted of popcorn popping and being contained inside a mobile device.⁴⁴ The court deemed that description too generic, but after the defendant amended its pleadings to recite nine specific elements, the court concluded that the defendant had raised a factual issue as to whether it had sufficiently described its trade dress.⁴⁵ Thus, as trade dress claims for digital environments have grown and extended from websites to apps, and as this type of litigation has become more common, the holders of these purported rights are finding ways to define their trade dress rights with sufficient particularity that enable them to survive motions to dismiss.

THE PITFALLS OF ENFORCEMENT

A party that pursues a cause of action for a violation of unregistered trade dress rights must: (1) define the trade dress; (2) prove that the purported trade dress is not functional; (3) establish that the trade dress is either inherently distinctive, or, if not inherently distinctive, has acquired secondary meaning that indicates the source of the goods or services; and (4) demonstrate a likelihood of confusion between the allegedly infringing product and the existing trade dress.⁴⁶ Some courts have described the first

⁴¹ No. 14–CV–03162–BLF, 2016 WL 3880797, at *1 (N.D. Cal. July 18, 2016).

⁴² *Id.* at *1.

⁴³ *Id.*

⁴⁴ *Id.* at *1–2.

⁴⁵ *See id.* (“(1) the popped kernels are all ‘approximately white’ and fully popped; (2) the app appears to randomly repeat a limited repertoire of fully popped kernels; (3) the kernels pop sequentially; (4) every popped kernel is visible when it pops; (5) the virtual container is shallow; (6) the container is vertically-oriented; (7) all kernels are identical in size, regardless of how near or far they are in the container; (8) each popped kernel appears to be brightly illuminated from one direction and continues to be illuminated from the same direction even when the kernel moves; and (9) the viewer sees directly into the side of the virtual container.”).

⁴⁶ *See Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000) (“The [Lanham Act] provides little guidance as to the circumstances under which unregistered trade dress may be protected. It does require that a producer show that the allegedly infringing feature is not ‘functional,’ see § 43(a)(3), and is likely to cause confusion with the product for which protection is sought. . . . Nothing in § 43(a) explicitly requires a producer to show that its trade dress is distinctive, but courts have universally imposed that requirement. . . . Distinctiveness is . . .

element in the context of analyzing whether the alleged trade dress has secondary meaning,⁴⁷ while others have done so in the context of addressing whether the alleged trade dress is non-functional.⁴⁸ Because of this inconsistency, the author proposes that it is best analyzed as a separate first prong.⁴⁹

Each of the four aforementioned requirements for a plaintiff to prevail in a cause of action for trade dress infringement⁵⁰ is discussed below.

The Requirement to Define the Trade Dress

In order to recover for the infringement of trade dress under section 43(a) of the Lanham Act, a party must identify the particular elements that comprise the trade dress.⁵¹ Identification requires two parts; (i) describing specific elements; and (ii) identifying how the elements in combination constitute trade dress.⁵²

an explicit prerequisite for registration of trade dress under § 2, and ‘the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a).’”); *see* *Libbey Glass, Inc. v. Oneida Ltd.*, 61 F. Supp. 2d 700, 704 (N.D. Ohio 1999) (discussing that the plaintiff must define trade dress rights, demonstrate distinctiveness, establish non-functionality, and prove a likelihood of confusion).

⁴⁷ *See* *Diamond Foods, Inc.*, No. 14–CV–03162–BLF, 2016 WL 3880797, at *10–11 (noting that secondary meanings of trade dresses are too general).

⁴⁸ *See, e.g.*, *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1067–69 (N.D. Cal. 2015) (discussing that trade dress protection is given in cases where there is a showing that the trade dress is not functional and therefore not an infringement).

⁴⁹ *See, e.g.*, *Touchpoint Commc’ns, LLC v. Dentsfone, LLC*, No. 3:15–CV–05240–JRC, 2015 WL 5918400, at *4 (W.D. Wash. Oct. 9, 2015) (requiring the trade dress to be defined without addressing functionality or secondary meaning is consistent with how other courts have approached the issue).

⁵⁰ 15 U.S.C.A. § 1125(a) (West, Westlaw through P.L. 112–190 approved 10/5/12).

⁵¹ *See* *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 768 (6th Cir.) (“[A] party must first identify what particular elements or attributes comprise the protectable trade dress.”), *cert. denied*, 546 U.S. 824, 824 (2005); *see also* *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 115–18 (2d Cir. 2001) (finding that a failure to articulate elements of trade dress leads to dismissal); *see also* *Bryant v. Matviashen*, 904 F. Supp. 2d 1034, 1046 (E.D. Cal. 2012) (“In order to state a trade dress claim for website design, the Sunlogics Group needs to clearly define the specific elements that constitute the trade dress; a general description of the site is insufficient.”).

⁵² *See* *Tumblebus*, 399 F.3d at 768 (discussing that a party must first identify the particular elements that comprise the trade dress, then show how the “trade dress is distinctive in the marketplace, that [the] trade dress is primarily nonfunctional, and that the . . . trade dress is confusingly similar to the party’s

First, a plaintiff must enumerate what specific elements of its website or app comprise a distinct feature.⁵³ A plaintiff will not state a cause of action by providing a formulaic recitation of elements of a cause of action for trade dress in combination with the elements that provide the basis for a copyright cause of action,⁵⁴ and providing a general description of the site is similarly insufficient.⁵⁵ Preferably, the discrete elements are separated out and identified in a list,⁵⁶ and neither the aura of prestige or status that surrounds a product or service nor an advertising theme can serve as trade dress.⁵⁷ As the Court of Appeals for the Third Circuit recently emphasized, the failure to allege any facts that relate to the substance of the purported trade dress owner's website may be a basis for dismissing the cause of action.⁵⁸

protected trade dress.”).

⁵³ See *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 310 (3d Cir. 2014) (“[T]he complaint does not enumerate what specific elements of its website comprise a distinctive trade dress. . . .”); see also *Keep a Breast Found. v. The Seven Grp.*, No. 11–CV–00570 BEN (WMc), 2011 WL 3240756, at *2 (S.D. Cal. July 28, 2011) (discussing that the plaintiff who failed to describe or even list the elements that composed the products’ overall look and feel did not sufficiently put the defendants on notice of the trade dress, and, consequently, the court dismissed the cause of action); see also *Salt Optics, Inc. v. Jand, Inc.*, No. SAVC 10–0828 DOC (RNBx), 2010 WL 4961702, at *4 (C.D. Cal. Nov. 19, 2010) (“A plaintiff must clearly articulate its claimed trade dress to give a defendant sufficient notice.”); see also *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240, 1244–46 (W.D. Wash. 2007) (noting that in one of the earliest cases of trade dress infringement of a website, the court denied a motion to dismiss when the plaintiff did no more than recite that it was seeking protection of the “look and feel” of its website. However, the district court in *Blue Nile* recognized that the legal theory before it was novel, and when legal theories are novel, courts should rarely grant motions to dismiss. “Determining the elements of plaintiff’s website that are subject to copyright protection, and what portions of the website relate to the ‘look and feel’ of its trade dress claims requires greater factual development.”).

⁵⁴ See *Touchpoint Commc’ns, LLC*, No. 3:15–CV–05240–JRC, 2015 WL 5918400, at *3 (alleging that the general “look and feel” of mobile apps and/or websites utilizing a copyright design is insufficient to establish a cause of action for trade dress).

⁵⁵ *Bryant*, 904 F. Supp. 2d at 1046.

⁵⁶ See *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 634 (6th Cir. 2002) (discussing that discrete elements should be in a list); see also *American Greetings Corp. v. Dan–Dee Imps., Inc.*, 807 F.2d 1136, 1147 (3d Cir. 1986) (noting that the preliminary injunction was denied when trade dress elements were not provided in an inclusive list); see also *Jalin Reality Capital Advisors, LLC v. A Better Wireless, NISP, LLC*, 917 F. Supp. 2d 927, 940 (D. Minn. 2013) (mere assertions of a distinct layout and unique color motif deemed insufficient to allege trade dress rights).

⁵⁷ *Abercrombie*, 280 F.3d at 630–31; *Jalin*, 917 F. Supp. 2d at 940.

⁵⁸ *Fair Wind Sailing, Inc.*, 764 F.3d at 310; see also *Test Masters Educ. Servs., Inc. v. State Farm Lloyds*, No. H–13–1706, 2014 WL 2854536, at *4 (S.D. Tex.

Second, a plaintiff that seeks to establish the possession of trade dress rights must do more than catalog a list of website features (which, as noted above, is advantageous to include),⁵⁹ and a laundry list of elements that constitute a product's design will usually be deemed insufficient.⁶⁰ A number of litigants have made the mistake of vaguely defining their trade dresses or listing a plurality of features without demonstrating how those features combine to create a "look and feel" of the website, only to have a court dismiss their claims.⁶¹ Thus, for a cause of action to survive even a motion to dismiss, "a complaint must 'synthesize' how these features 'combine to create the website's protectable 'look and feel.'"⁶²

Additionally, conclusory characterizations of "unique," "high-end," "distinctive," and "three-dimensional" have been held to be insufficient to define a trade dress.⁶³ Similarly,

June 23, 2014) (indicating that an allegation that a website is "confusingly similar" based on information used, but failing to allege inherently distinctive "look and feel" or "trade dress," is insufficient to establish a claim for trade dress infringement), *aff'd* 791 F.3d 561, 563 (5th Cir. 2015); *Bryant*, 904 F. Supp. 2d at 1046 (indicating that plaintiffs need to clearly define the specific elements that constitute the trade dress since a general description of the website is insufficient).

⁵⁹ See *FC Online Mktg., Inc. v. Burke's Martial Arts, LLC*, No. 14-CV-3685(SJF)(SIL), 2015 WL 4162757, at *10 (E.D.N.Y. July 8, 2015) ("[A] mere cataloguing of a website's features does not give defendants adequate notice of plaintiff's trade dress claim . . . especially, when . . . the list of features comprising the trade dress is not complete [.]"); see also *Salt Optics, Inc. v. Jand, Inc.*, No. SAVC 10-0828 DOC (RNBx), 2010 WL 4961702, at *5 (C.D. Cal. Nov. 19, 2010) ("[A] mere cataloguing of a website's features does not give defendants adequate notice of a plaintiff's trade dress claim.").

⁶⁰ *Parker Waichman LLP v. Gilman Law LLP*, No. 12-CV-4784(JS)(AKT), 2013 WL 3863928, at *4 (E.D.N.Y. July 24, 2013); see also *Sleep Science Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010) ("Although it has catalogued several components of its website, Plaintiff has not clearly articulated which of them constitute its purported trade dress. Notably, Plaintiff employs language suggesting that these components are only some among many, which raises a question of whether it intends to redefine its trade dress at a future stage of litigation. Without an adequate definition of the elements comprising the website's 'look and feel,' [Defendant] is not given adequate notice.").

⁶¹ See *Parker Waichman LLP*, No. 12-CV-4784(JS)(AKT), 2013 WL 3863928, at *4 (indicating that the failure to synthesize elements was fatal to Plaintiff's claim); *Sleep Science Partners*, No. 09-04200 CW, 2010 WL 1881770, at *3 ("Although it has cataloged several components of its website, Plaintiff has not clearly articulated which of them constitute its purported trade dress.").

⁶² *Parker Waichman LLP*, No. 12-CV-4784(JS)(AKT), 2013 WL 3863928, at *4 (quoting *Salt Optics, Inc.*, No. SAVC 10-0828 DOC (RNBx), 2010 WL 4961702, at *5).

⁶³ *In re Idearc, Inc.*, No. 09-31828-BJH-11, 2011 WL 203859, at *14 (N.D.

conclusory allegations that the trade dress “serves to identify [the plaintiff],” is “widely recognized,” is “distinctive,” and is “not merely functional;” and that the defendant’s similar website is “likely to cause consumer confusion,” . . . are not entitled to the assumption of truth and are insufficient to state a plausible claim for trade dress infringement under the Lanham Act.⁶⁴

Furthermore, a vague reference to a website’s “design and layout” and “color motif” has been held not to provide a sufficient basis for a jury to conclude that a trade dress is inherently distinctive or that it has acquired secondary meaning.⁶⁵

Courts have also noted that litigants cannot necessarily be saved by allegations that are offered “by way of illustration, not by limitation.”⁶⁶ Thus, litigants should avoid phrases such as “including but not limited to” and “among others” when defining their trade dress. Instead, there must be a synthesis of elements in order to describe the way that the features combine to create a protectable look and feel.⁶⁷

The requirement for synthesizing the trade dress has been applied onerously by some courts. For example, in *Parker Waichman LLP v. Gilman Law LLP*,⁶⁸ the plaintiff identified a few, but not all, of the features that it believed constituted its trade dress, including specific colors, layouts, and interactive buttons.⁶⁹

Tex. Jan. 21, 2011).

⁶⁴ *FC Online Mktg., Inc.*, No. 14–CV–3685 (SJF)(SIL), 2015 WL 4162757, at *10.

⁶⁵ *Jalin Realty Capital Advisors, LLC v. A Better Wireless, NISP, LLC*, 917 F. Supp. 2d 927, 940 (D. Minn. 2013).

⁶⁶ *Salt Optics, Inc.*, No. SAVC 10–0828 DOC (RNBx), 2010 WL 4961702, at *5 (“In this case, the FAC states that its trade dress allegations are offered ‘by way of illustration, not by limitation.’ Following this disclaimer, Plaintiff describes several elements of the Salt website. While Plaintiffs describe these elements with a certain amount of detail, absent from the FAC is any attempt to synthesize these elements in order to describe the way that the listed elements, in conjunction, combine to create the website’s protectable ‘look and feel.’ The lack of any such synthesis, in conjunction with Plaintiff’s expressly stated intention to incorporate other elements of the website into the trade dress claim at a later stage, gives the Court pause.”).

⁶⁷ *Id.*

⁶⁸ No. 12–CV–4784(JS)(AKT), 2013 WL 3863928 (E.D.N.Y. July 24, 2013).

⁶⁹ *Id.* at *1–2 (noting the features as (1) a blue header bar that listed topics in white type relating to personal injury and mass torts and separated by white vertical bars; (2) the firm name, logo, and descriptive line, “A National Law Firm,” directly above the header on the left; (3) an element of scrolling images and news headlines with back, pause, and forward buttons directly below the header; (4) a shaded box that contained links to current drugs, products, and legal issues, with only headers and no additional descriptions directly below the buttons; (5) a blue footer bar of approximately ten lines that repeated the element

Despite reciting a number of elements, the court held that plaintiff's trade dress cause of action failed because the complaint merely listed a few of the features that the plaintiff believed constituted its trade dress, and the complaint made no attempt to synthesize those elements.⁷⁰ The court emphasized that the plaintiff's allegations were "conclusory and fail[ed] to plausibly suggest that the combination of blue headers, pause and forward buttons, and brightly colored boxes are synonymous with Plaintiff's firm or would cause consumers to mistake [Plaintiff's] website for [that of Defendant.]"⁷¹

In contrast to *Parker Waichman*, in *Lepton Labs, LLC v. Walker*,⁷² the plaintiff identified ten features of its trade dress, and did not suggest that the list was incomplete.⁷³ The court, in *Lepton Labs*, noted that the list did appear to be a catalog, but it was reluctant to dismiss the cause of action at the pleading stage, emphasizing that, "[s]o long as a plaintiff has alleged a complete recitation of the concrete elements of its alleged trade dress, it should be allowed to proceed."⁷⁴

The opinions in *Parker Waichman* and *Lepton Labs* can be reconciled based on the fact that the plaintiff in *Parker Waichman* suggested that there might be additional trade dress elements not contained in its list, whereas in *Lepton Labs*, the plaintiff did not do so.⁷⁵ However, the different outcomes may also, at least in part, be due to the courts in the Ninth Circuit being more reluctant to dismiss causes of action at the pleading stage.⁷⁶ For example, in

of the firm name and logo; (6) a blue banner addressed to visitors with a question that recites in white type, FREE CASE REVIEW, and clicks through to a page submission form; and (7) topics pages).

⁷⁰ *Id.* at *4.

⁷¹ *Id.*

⁷² 55 F. Supp. 3d 1230 (C.D. Cal. 2014).

⁷³ *Id.* at 1239–40 ("Lepton Labs has described its trade dress as the following elements: a. formatting of logos, graphics, photographs, and text; b. light blue background with clouds behind the logo; c. light blue and orange color schematic; d. before and after comparison photographs; e. comparison chart; f. satisfaction guaranteed certificate and language; g. text appearing at the bottom of the page, including customer service telephone number; h. style and aesthetic of active ingredient section; i. presentation of trial offer page; and j. the particularized combination of all of these elements.").

⁷⁴ *Id.* at 1240.

⁷⁵ Compare *Parker Waichman LLP*, No. 12–CV–4784(JS)(AKT), 2013 WL 3863928, at *4 (rejecting plaintiff's complaint because it "merely lists a few, but not all, of the features"), with *Lepton Labs, LLC*, 55 F. Supp. 3d at 1240 (holding that plaintiff's pleading method was sufficient because the complaint did not suggest that the listed features were "only some among many.").

⁷⁶ See, e.g., *SG Services Inc. v. God's Girls Inc.*, No. CV 06–989 AHM (CTx),

one case,⁷⁷ the United States District Court for the Northern District of California, even at the summary judgment motion stage, did not treat the plaintiff's open-ended language which suggested that its identified trade dress features were only some among many, to be a basis on which to defeat a trade dress claim.⁷⁸

One example of a plaintiff that was successfully able to articulate a definition of trade dress rights outside of the Ninth Circuit appears in *Express Lien, Inc. v. Nationwide Notice, Inc.*⁷⁹ In that case, the court concluded that the plaintiff adequately synthesized the unique allegations of its website to demonstrate how those elements qualified as protectable trade dress when, despite “not painstakingly” describing the protectable nature, the complaint did clearly identify unique aspects of the website (in that case, a state by state resource for lien holders), and alleged that the website's design was “widely recognized by consumers and ha[d] become a valuable indicator of the source and origin of the information provided.”⁸⁰

Functionality

Under trade dress law, a product's feature is not functional if the feature is not essential to the product's use and does not affect the product's cost or quality.⁸¹ Thus, under this prong, one may ask whether an exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.⁸² Functionality is determined by focusing on the item as a whole, not on whether any one particular feature is functional.⁸³ Therefore, when

2007 WL 2315437, at *8 (C.D. Cal. May 9, 2007) (evaluating a claim for trade dress infringement when the only alleged features in the plaintiff's complaint were (1) the color pink; and (2) the use of specific phrases).

⁷⁷ *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1135–38 (N.D. Cal. 2014).

⁷⁸ *Id.*

⁷⁹ No. 16–2926, 2016 WL 7097382 (E.D. La. Dec. 5, 2016).

⁸⁰ *Id.* at *3–4 (noting that, with respect to the sufficiency of the allegations of a likelihood of confusion, the complaint listed five specific elements of the plaintiff's website that the defendant copied).

⁸¹ *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 165 (1995) (functionality refers to a feature being essential to the product's use or purpose, or if it affects the cost or quality of the device); *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1068 (N.D. Cal. 2015).

⁸² *See, e.g., Qualitex Co.*, 514 U.S. at 165 (citing *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 850 n.10 (1982)) (“[A] product feature is functional . . . if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.”).

⁸³ *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 842 n.7 (9th Cir.

multiple elements combine to form one visual whole, the fact that individual elements of the trade dress might be functional does not necessarily mean that the trade dress as a whole is functional.⁸⁴

With respect to parties that claim trade dress rights in websites, the functionality test is a low bar. “[A]s long as there are alternate ways to design a website, beyond the arrangement protected by the trade dress, the site’s interface should not be considered functional.”⁸⁵ Nevertheless, one must keep in mind that the burden of establishing non-functionality is on the party that takes the position that trade dress rights exist.⁸⁶

In the recent case, *Fair Wind Sailing v. Dempster*,⁸⁷ the only appellate case to address trade dress rights in a website, the plaintiff, a company that owned sailing schools, alleged that there was infringement of the trade dress of its website.⁸⁸ However, the elements that it identified as its combination were the choice to employ solely catamaran vessels, its unique teaching curriculum, and student testimonials.⁸⁹ As the Court of Appeals for the Third Circuit noted, these features were all functional because they contributed to the demand for the plaintiff’s service and did not merely identify the plaintiff.⁹⁰ Consequently, the court dismissed the cause of action.⁹¹

By contrast, the combination of color and specific phrases has been held to be non-functional.⁹² For example, in *Ingrid & Isabel*,

1987); *Lepton Labs, LLC v. Walker*, 55 F. Supp. 3d 1230, 1238, 1240 (C.D. Cal. 2014); *Arcsoft, Inc.*, 153 F. Supp. 3d at 1068 (within the Ninth Circuit, the determination of functionality rests on the consideration of several factors, including “(1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of the design, and (4) whether a particular design results from a comparatively simple or inexpensive method of manufacture.”).

⁸⁴ See, e.g., *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001) (“Courts have repeatedly cautioned that, in trademark – and especially trade dress-cases, the mark must be examined as a whole, not by its individual constituent parts.”).

⁸⁵ *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1137 (N.D. Cal. 2014) (quoting *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006–76, 2010 WL 1626072, at *17 (W.D. Penn. Mar. 31, 2010)).

⁸⁶ 15 U.S.C. § 1125(a)(3) (West, Westlaw through P.L. 112–190 approved 10/5/12) (noting a presumption of functionality).

⁸⁷ 764 F.3d 303 (3d Cir. 2014).

⁸⁸ *Id.* at 305.

⁸⁹ *Id.* at 309.

⁹⁰ *Id.* at 310.

⁹¹ *Id.* at 315.

⁹² See *SG Services Inc. v. God’s Girls Inc.*, No. CV 06–989 AHM (CTx), 2007 WL 2315437, at *9 (C.D. Cal. May 9, 2007) (noting that colors and phraseology

LLC. v. Baby Be Mine, LLC,⁹³ the plaintiff asserted the following elements were non-functional: the choice to use a “feminine script,” the use of a “pastel pink-orange hue,” the use of “[p]ink and orange script,” the “[c]olor and pattern of wallpaper,” and the particular poses chosen for its models.⁹⁴ The court concluded that having asserted these non-functional elements and asserted that their arrangement and overall combination were non-functional, there was at a minimum, a triable issue of fact as to the non-functionality of the website.⁹⁵

Distinctiveness

“A mark or dress is distinctive when it identifies the particular source of a product [or service] or distinguishes it from other products [and services].”⁹⁶ Websites have been described as analogous to design, and, thus, are not inherently distinctive.⁹⁷ Consequently, an owner or operator of a website or app must show that the website’s “look and feel” acquired secondary meaning,⁹⁸ which refers to the mental association that a substantial segment of consumers and potential consumers form between the trade dress in question and the source of that trade dress.⁹⁹ Thus, the issue of distinctiveness turns on whether the purchasing public associates the trade dress with a single producer or source as opposed to the product or service itself.¹⁰⁰

Among the factors that may be considered when inquiring into whether a product design has acquired secondary meaning are:

- (1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer;
- (2) the degree and manner of advertising under the claimed trademark;
- (3) the length and manner of use of the claimed trademark;
- (4) whether use of the claimed trademark has been exclusive;
- (5) evidence of sales, advertising, and promotional activities;
- (6) unsolicited media

features may be non-functional).

⁹³ 70 F. Supp. 3d 1105 (N.D. Cal. 2014).

⁹⁴ *Id.* at 1136.

⁹⁵ *Id.* at 1138.

⁹⁶ *Id.* at 1137.

⁹⁷ *See id.* (“The Supreme Court has held that ‘design, like color is not inherently distinctive.’”).

⁹⁸ *Id.*

⁹⁹ *Walker & Zanger, Inc. v. Paragon Industries, Inc.*, 549 F. Supp. 2d 1168, 1179 (N.D. Cal. 2007) (distinctiveness refers to the ability to show secondary meaning, which refers to being an identification of source and not the product itself); *Berg v. Symons*, 393 F. Supp. 2d 525, 550 (S.D. Tex. 2005).

¹⁰⁰ *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir. 1987).

coverage of the product; and (7) attempts to plagiarize the mark.¹⁰¹

This prong may be the most difficult of the four for a website or app owner or operator to satisfy when making a case for trade dress infringement. By way of example of the challenge in proving this type of infringement, in *SG Services Inc. v. God's Girls Inc.*,¹⁰² the plaintiff contended that it had trade dress rights in its use of color and specific phrases.¹⁰³ The plaintiff had offered evidence of commercial success, but it failed to offer sufficient evidence that its commercial success had led the public to associate the source with the claimed trade dress.¹⁰⁴ Therefore, there was no secondary meaning or acquired distinctiveness.¹⁰⁵

Likelihood of Confusion

With respect to the issue of the likelihood of confusion, the various circuits have developed different frameworks under which to consider this issue.¹⁰⁶ However, regardless of the circuit in which the case is brought, this prong will focus in part on the similarity between the “look and feel” of the two websites at issue.¹⁰⁷ This requires looking at the alleged trade dress elements in combination.¹⁰⁸ Therefore, how the party defines its trade dress rights is critical because it will dictate how the trier of fact will apply the likelihood of confusion test.

Should major features, such as color schemes and website layouts, of the party that alleges trade dress infringement differ from those of the accused infringers, a party that alleges trade dress infringement may face an uphill battle in proving its case.¹⁰⁹ Additionally, differences in content can contribute to a finding of a

¹⁰¹ *SG Services Inc. v. God's Girls Inc.*, No. CV 06–989 AHM (CTx), 2007 WL 2315437, at *9 (C.D. Cal. 2007).

¹⁰² No. CV 06–989 AHM (CTx), 2007 WL 2315437 (C.D. Cal. 2007).

¹⁰³ *Id.* at *8.

¹⁰⁴ *Id.* at *9–10.

¹⁰⁵ *Id.* at *10.

¹⁰⁶ See generally ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS § 2:45 (3d. ed 2010) (the Lanham Act does not define a likelihood of confusion, but instead the various appellate courts have set forth the standards, with little variation among the circuits).

¹⁰⁷ See *supra* Part V (discussing the elements of trade dress infringement).

¹⁰⁸ *Diamond Foods, Inc. v. Hottrix, LLC*, No. 14–CV–03162–BLF, 2016 WL 3880797, at *12 (N.D. Cal. July 18, 2016).

¹⁰⁹ See *Jalin Realty Capital Advisors, LLC v. A Better Wireless, NISP, LLC*, 917 F. Supp. 2d 927, 940 (D. Minn. 2013) (where plaintiff's website had very different color schemes and layouts as compared to defendant's website).

lack of a likelihood of confusion.¹¹⁰ Further, because the look and feel may involve more than static elements, this prong may be extremely fact-intensive and costly to resolve for both parties.

CONCLUSION

As brick and mortar stores lose market-shares to e-commerce, and America's most renowned companies invest more and more in developing their e-clientele, they must find ways to distinguish themselves in the preferred vehicle of commerce in the twenty-first century—on the web and through mobile applications. The technological ease with which one can copy and replicate the experience of another's website makes doing so too inviting for newcomers and re-branders who seek to profit off the work of others. Consequently, entities that have e-commerce presences should look to define and cultivate their trade dress rights in order to be able to dissuade and preclude others from profiting off of their "look and feel." However, the holders of these trade dress rights should be aware that particularly unregistered trade dress, which is the norm in these types of cases, is a difficult right to enforce. Until a universal and easy-to-apply rubric is developed under which to analyze these causes of action, there will likely remain both a great deal of unpredictability and a requirement of a significant amount of resources in order to enforce trade dress rights in websites and apps.

¹¹⁰ *Id.*