

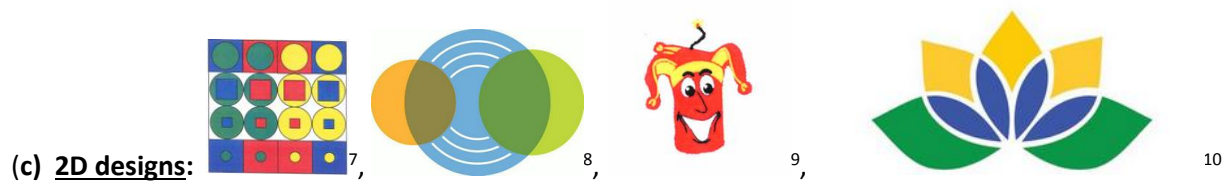


TRADEMARKS AND THINGS THAT GO BUMP IN THE NIGHT

1. Traditional Marks

A trademark is defined as “a word, phrase, symbol and/or design that identifies and distinguishes the source of the goods of one party from those of others.”² Most people are aware of marks that are common words or coined terms (collectively, “words”); words & two dimensional (“2D”) designs; and 2D designs. Below are some examples:

(a) **Words:** **CLOROX** for bleach, **ADIDAS** for shoes, **DAWN** for dishwashing liquid and **HORIZON** for heavy whipping cream;



¹ ClipArt courtesy of About.com Desktop Publishing (<http://desktoppub.about.com/od/freeclipart/l/blironon.htm>).

² USPTO.gov, Trademark Basics.

³ U.S. Reg. No. 4608399.

⁴ U.S. Reg. No. 4608069.

⁵ U.S. Reg. No. 4608288.

⁶ U.S. Reg. No. 4607946.

⁷ U.S. Reg. No. 4612193.

⁸ U.S. Reg. No. 4607803.

⁹ U.S. Reg. No. 4607576.

¹⁰ U.S. Reg. No. 4609229.

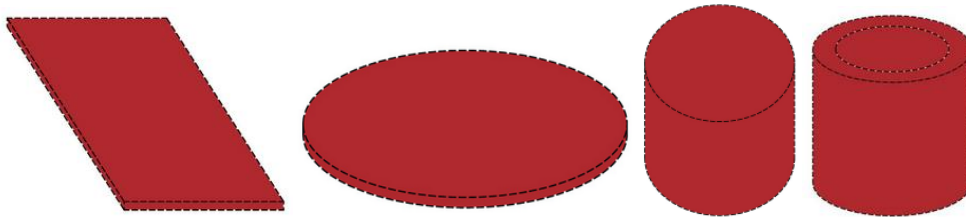
2. Non-Traditional Marks

Not everyone is aware that other types of designs, symbols and devices can also be considered marks if they can be demonstrated to have acquired distinctiveness and function as a mark, i.e., identify and distinguish the goods from others and indicate the source of the goods or services. Through court decisions and policies adopted by the United States Patent and Trademark Office, other types of designs, symbols and devices can include color, sound, scent, holograms, trade dress and three dimensional (3D) designs. Examples of these types of non-traditional marks are:

(a) Color: Color marks consist of one or more colors used on particular objects. Color may be used on the entire surface of the goods, on a portion of the goods, or on all or part of the packaging for the goods. Below are examples of color marks with color on the entire surface of the goods (sheets of polyurethane (i) and applied to vehicles (ii)) and packaging for the goods (iii):

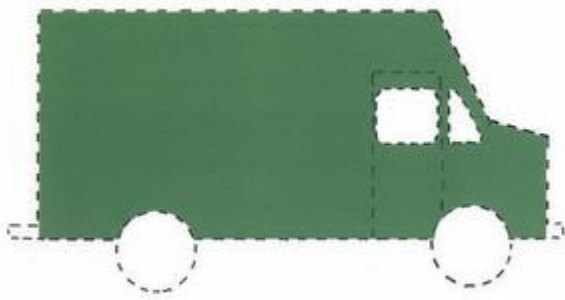
(i) Color “red” in connection with different shapes (sheets, table covers and cylinders) of polyurethane.¹¹

Mark:



(ii) Color “green” applied to vehicles used in performing home-delivery services.¹²

Mark:



Vehicle Depiction:

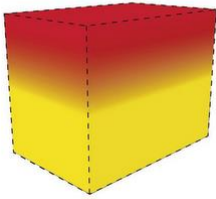


¹¹ U.S. Reg. Nos. 4600188, 4600189, 4600190 and 4600219; also see September 11, 2014 Blog post at <http://ntmblog.wordpress.com>.

¹² U.S. App. No. 86975240; final review before publication.

(iii) Colors “red, orange and yellow in a transitioning scheme from red to orange to yellow as applied to product packaging” for dietary supplements.¹³

Mark:



Packaging:



(b) **Sound:** A sound mark identifies and distinguishes a product or service through audio rather than visual means. Sounds may be registered when they are arbitrary, unique or distinctive and invoke the source of the product or service. Below are several examples of registered sound marks:

(i) “[A] crowd cheering the following words ‘Woooooo. Pig. Sooie! Woooooo. Pig. Sooie! Woooooo. Pig. Sooie! Razorbacks!’” for collegiate athletic and sporting events.¹⁴ To listen, go to: <https://tsdrsec.uspto.gov/ts/cd/casedoc/sn86021236/SPE20130726170011/1/download>;

(ii) “[T]he song ‘Turkey in the Straw’” for use with ice cream makers.¹⁵ To listen go to: <https://tsdrsec.uspto.gov/ts/cd/casedoc/sn85485669/MRK20111202120324/1/download>; and

(iii) “Toys R Us song” for various retail store and on-line retail store services.¹⁶ To listen, go to <https://tsdrsec.uspto.gov/ts/cd/casedoc/sn78947644/EVI20090309154429/1/download>.

(c) **Scent:** The scent of a product may be considered a mark if it is used in a nonfunctional manner. Scents that serve a utilitarian purpose, such as perfume or air freshener, are functional and are not registrable. Below are examples of registered scent marks:

(i) Cherry scent for synthetic lubricants for high performance racing and recreational vehicles;¹⁷

(ii) Toothbrushes impregnated with the scent of strawberries;¹⁸ and

(iii) Rose oil scent or fragrance for advertising and marketing promotional services.¹⁹

¹³ U.S. App. No. 86116725; approved for publication.

¹⁴ U.S. Reg. No. 4558864.

¹⁵ U.S. Reg. No. 4339528.

¹⁶ U.S. Reg. No. 3307300.

¹⁷ U.S. Reg. No. 2463044.

¹⁸ U.S. Reg. No. 3332910.

¹⁹ U.S. Reg. No. 3849102.

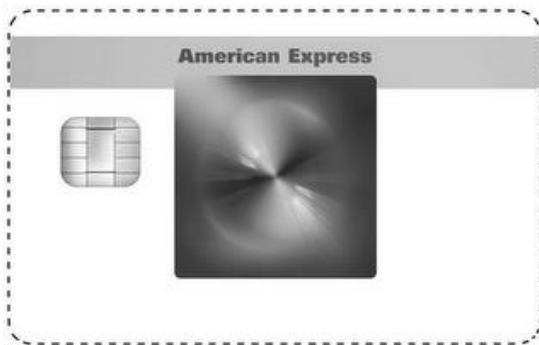
(d) Holograms: A hologram is a 3D image created with photographic projection and can be considered to be a mark if there is consumer recognition of it as an identifier of source of the goods or services. Examples of registered hologram marks are:

(i)



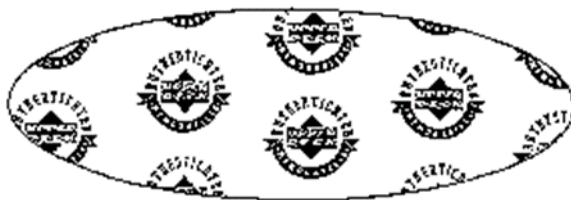
for “authentication services using holographic overlays, holograms and... [3 D] markings for electronic documents, e-mail webpages and websites”²⁰;

(ii)



for “charge card and credit card services”²¹; and

(iii) UPPER DECK AUTHENTICATED MEMORABILIA & Design



memorabilia... ”²²

for various “autographed sports

(e) Trade Dress: Trade dress is considered to be a “symbol” or “device” and is defined as the total image and overall appearance of a product and includes the design of a product (product shape or configuration) and product packaging (including the interior of a restaurant, or other place of business).

²⁰ U.S. Reg. No. 4189051.

²¹ U.S. Reg. No. 3045251.

²² U.S. Reg. No. 2619227.

However, trade dress is a broad phrase in that all that is capable of carrying meaning may constitute trade dress that identifies the source or origin of a product. Examples of product packaging (lobby interior (i)) and product design (product configuration (ii) and design element (iii)) are below:

(i) CAMP BOW WOW LOBBY INTERIOR with a “rustic, western inspired camping theme” including the check in desk framed by log posts, check in and check out gates with signs, large medallion and floor mat featuring the Camp Bow Wow logo, three red hanging triangular lights, artificial fireplace, flooring of brown wood or wood-like appearance and sage green walls. The colors red, white, brown, and sage green are claimed as a feature of the mark.²³

Mark:



Lobby:



(ii) SCENTSY ORNAMENTAL 3-D WAX WARMER. “[T]he claimed trade dress includes an ‘S-shaped’ hourglass body design; a square deep top with edges and rounded corners that oppose the warmer body at an obtuse angle; a unique arrangement of three holes on each of the four sides of the warmer; and a linear concavity circumscribing the bottom of the warmer above the base.”²⁴

Mark:



Wax Warmer:

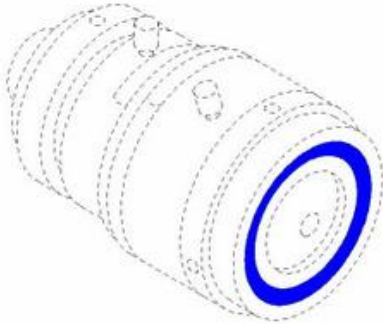


²³ U.S. Reg. No. 4566177. Also see September 7, 2014 Blog post (<http://ntmblog.wordpress.com>).

²⁴ U.S. Reg. No. 4599568. Also see September 15, 2014 Blog post (<http://ntmblog.wordpress.com>).

(iii) **THEIA TECHNOLOGIES BLUE RING.** “The mark consists of the 3D trade dress of a blue ring in the lens housing of a photographic lens.”²⁵

Mark:



Lens:



(f) **3D Designs:** 3D marks are marks with height, width and depth. Examples of registered 3D marks are below:

(i) **3D flashlight design** described as a “three-dimensional configuration of an elongated oval light casing having one end featuring a similarly formed transparent window for covering an array of lights beneath the transparent window. The broken lines depicting the handle indicate placement of the mark on the goods and are not part of the mark.”²⁶



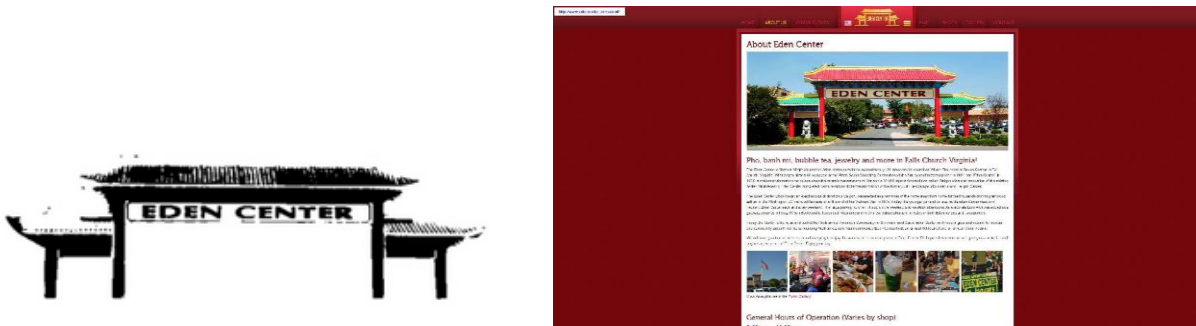
²⁵ U.S. Reg. No. 4524463.

²⁶ U.S. Reg. No. 4616040; also see October 11, 2014 Blog post (<http://ntmblog.wordpress.com>).

(ii) **Football shaped brownies** defined as “a three-dimensional configuration of a brown football shaped brownie having white stripes around the circumference and a brown lacing panel on the front surface.”²⁷



(iii) **Eden Center gate configuration** is described as “three dimensional [3D] gates featuring one large span with the wording “EDEN CENTER” underneath and two small spans on each side.”²⁸



3. Conclusion

Shown above are different marks that are wonderfully diverse from a made up term (**CLOROX**) to the **blue ring of a photographic lens** to **three dimensional gates** at the entrance of a shopping center. As long as the word, phrase, symbol and/or design can be shown to distinguish itself and elicit the source of a product or service, it can be protected and registered as a mark. The next article in this series will provide some tips for demonstrating these functions (distinctiveness and source identifier) in order to streamline the registration process.

Mary B. Aversano is an attorney with over twenty years of experience in all aspects of domestic and international trademark law including clearance, prosecution, maintenance, agreements and enforcement on a global basis. She has experience with related areas of copyright, domain names, social media, design patents, litigation and contentious matters including TTAB proceedings and UDRP complaints but her passion is for non-traditional marks. See her Blog on non-traditional marks at <http://ntmblog.wordpress.com>.

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²⁷ U.S. Reg. No. 4612480; also see October 2, 2014 Blog post (<http://ntmblog.wordpress.com>).

²⁸ U.S. Reg. No. 4620141; also see October 20, 2014 Blog post (<http://ntmblog.wordpress.com>).