Trademark and Unfair Competition Law

Slides 3: Inherent Distinctiveness; Suggestive v. Descriptive Marks
Class Outline

- Distinctiveness
- Suggestive v. Descriptive
Distinctiveness

Statutory Source:

LA §45: “The term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof . . . used by a person . . . To **identify and distinguish** his or her **goods**, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”

2 types:

1. Inherent Distinctiveness

2. Acquired Distinctiveness (aka “Secondary Meaning”)
“Safari” hats

Abercrombie & Fitch

Hunting World
Safari Outfits

The Safari outfits, illustrated on the following page, are made from an imported English cotton drill material that has been specially "Crescented" to shed rain. Of very tough substance, practically unsharable, yet soft and pliable. Has a smooth, scotch-like finish. Excellent for lightweight, summer wear. Color is sand khaki. Samples of the material will gladly be sent on request.

**THE SAFARI**

A practical jacket of coat-shirt style, that allows perfect freedom of action. Regular shirt collar and sleeves with full belt and large, many-pocketed. Two lower pockets are bellows style. No. 4835 $12.00

Women’s Safari jacket in same style as above. Sizes 16 to 48 $15.50

**SAFARI SHORTS**

A very practical and serviceable pair of shorts for camp or tropical wear. Cut with ample seat room for additional comfort. Has two top pockets, a watch pocket and two rear hip pockets. No. 4847 $4.25

**SAFARI TROUSERS AND BREECHES**

Safari Trousers. Will match any of the Safari jackets or coats. Full cut and finished, with two front and two flap covered hip pockets. No. 4836 $8.00

Safari Breeches. Laced cuff style, cut especially to allow full freedom under all conditions. Made with double fronts. No. 4839 $8.75

**SAFARI HOOD HELMET**

A slightly higher crown than the Safari Trout Helmet, with a 2½-inch green underbrim, screen covered side vents and leather sweat band. No. 48350 $13.75

**SAFARI TROUT HELMET**

A fine, lightweight fishing helmet. Has a low crown, 2 inch brim and leather sweat band. No. 4835 $2.75
Mens Bush Poplin **Safari Jacket** - TravelSmith
TravelSmith
$129.00

Cabela's **Safari Jacket** - R - Black (L)
Cabela's
$49.99

Marc Anthony **Safari Jacket**
Kohl's
$72.00

Cabela's **Safari Jacket** - T - Watermelon (3XL)
Cabela's
$54.99

**MICHAEL Michael Kors Casual Safari Jacket**, Women's
Michael Kors
$56.00

Kenneth Cole Reaction black wool **safari jacket**
Bluefly.com
$148.99
# The Continuum of Distinctiveness

<table>
<thead>
<tr>
<th>Inherently Distinctive</th>
<th>Capable of becoming distinctive</th>
<th>Never distinctive</th>
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</thead>
<tbody>
<tr>
<td>Fanciful &amp; Arbitrary</td>
<td>Suggestive</td>
<td>Generic</td>
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<tr>
<td>KODAK cameras</td>
<td>COPPERTONE lotion</td>
<td>BEST BUY retail stores</td>
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<tr>
<td>APPLE computers</td>
<td></td>
<td>Milk, Hat, Bread, Car</td>
</tr>
</tbody>
</table>
The Continuum of Distinctiveness

1. Inherently distinctive marks:
   -- arbitrary marks
   -- fanciful marks
   -- suggestive marks
   -- some unique, eye-catching abstract designs
   (capable of protection upon use—no secondary meaning required)

2. Marks that are capable of becoming distinctive:
   -- descriptive marks
   -- geographically descriptive marks
   -- surname marks
   -- common or simple abstract designs or colors
   (only capable of protection upon acquisition of secondary meaning)

3. Marks that are incapable of becoming distinctive:
   -- generic words and symbols
   (not capable of protection under any circumstances)
Descriptive v. Suggestive Marks

1. **Dictionary**: the ordinary significance and meaning of words

2. **The imagination test**: How much imagination is required on the consumer’s part in trying to cull some indication from the mark about the qualities, characteristics, effect, purpose, or ingredients of the product or service?

3. **Competitor need**: Are sellers of similar products likely to use, or...

4. **Competitor use**: ... do they actually use the term in connection with their goods?