Trademark and Unfair Competition Law

Slides 7: Product Packaging Trade Dress: Abercrombie v. Seabrook

LAWS 7341-001
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Class Outline

• Analyzing inherent distinctiveness of product packaging trade dress:
  • *Seabrook* factors
  • *Abercrombie* factors
  • 2\textsuperscript{nd} Cir’s “total look” approach
The “Seabrook” factors for inherent distinctiveness of trade dress:

1. Whether it is a “common” basic shape or design

2. Whether it is unique or unusual in the particular field

3. Whether it is a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods

4. Whether it is capable of creating a commercial impression distinct from the accompanying words
Is the trade dress inherently distinctive?

(1) Does the trade dress in question belong to a category that the courts have said will never be inherently distinctive?
   - Color (alone) – Qualitex
   - Product design/config. – Walmart v. Samara

Yes → No inherent distinctiveness - must show secondary meaning

No → Yes

Apply inherent distinctiveness test (Seabrook or Abercrombie)
Is the trade dress inherently distinctive? (cont.)

(2) If Seabrook, apply factors:

1. Whether it is a “common” basic shape or design
2. Whether it was [not] unique or unusual in the particular field
3. Whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods
4. Whether it was capable of creating a commercial impression distinct from the accompanying words
(3) Finally, if the trade dress passes the Seabrook factors, we double-check by asking whether the trade dress is descriptive – i.e. does it provide information about the good or service in question that we think competitors need access to?