

# TRADEMARK & UNFAIR COMPETITION

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Class 2: Trademark Distinctiveness, the Abercrombie Spectrum, and Inherent Distinctiveness

# CLASS OUTLINE

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- Distinctiveness (Inherent)
- The *Abercrombie* Spectrum

# Establishing Trademark Rights

1. The trademark must be “distinctive” of the source of the goods or services
2. The trademark must not be barred from protection (e.g., functionality)
3. The trademark must be used in commerce

# 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”)

# *Abercrombie & Fitch Co. v. Hunting World, Inc.*



# “Safari” hats

Abercrombie & Fitch



Hunting World



## Safari Outfits

The Safari outfits, illustrated on the following pages, are made from an imported English, cotton drill material that has been specially "Cravensted" to shed rain. Of very tough substance, practically untearable, yet soft and pliable. Has a smooth, suede-like finish. Excellent for lightweight, Summer wear. Color is sand khaki. Swatches 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, roomy pockets. Two lower pockets are bellows style. No. 4215 .....\$16.90

Women's Safari jacket in same style as above. Size 16 to 40.....\$16.90

### 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. 4247....\$4.25

**ALBENSONNIE & FEUCH CO.**

MAIN OFFICE AT 144 FIFTH, NEW YORK

### SAFARI TROUT HELMET



A fine, lightweight fishing helmet. Has a low crown, 2 inch brim and leather sweat band. No. 22152 .....\$2.75

### SAFARI TROUSERS AND BREECHES



Safari Trousers. Will match any of the Safari jackets or coats. Well cut and finished with two front and two flap covered, hip pockets. No. 4242.....\$5.00

Safari Breeches. Lace cuff style, cut especially to allow full freedom under all conditions. Made with double braces. No. 4218 .....\$6.75

### SAFARI HOOD HELMET



A slightly higher crown than the Safari Trout Helmet with a 2 1/2 inch green underbrim, screen covered side vents and leather sweat band. No. 22150 .....\$3.75





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



**Safari**

# The Continuum of Distinctiveness

Inherently Distinctive

Capable of becoming  
distinctive

Never  
distinctive

Fanciful & Arbitrary	Suggestive	Descriptive	Generic
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KODAK cameras

APPLE computers

COPPERTONE  
lotion

BEST BUY  
retail stores

Milk, Hat,  
Bread, Car

# 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:

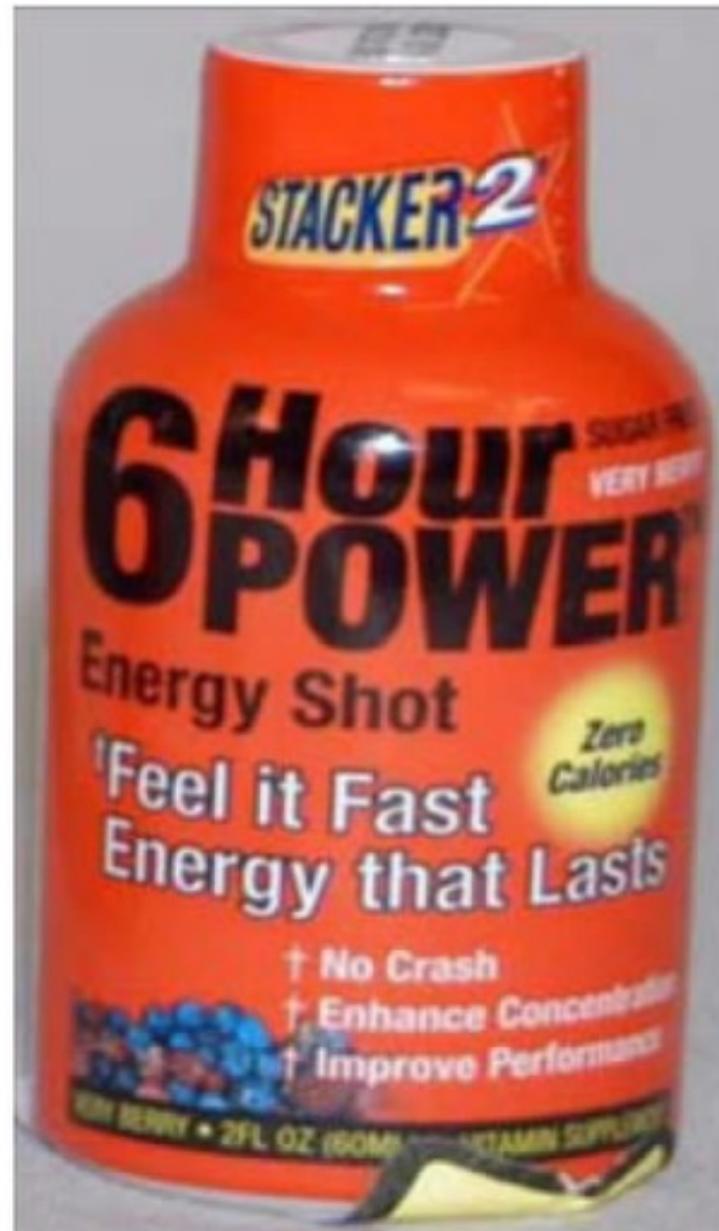
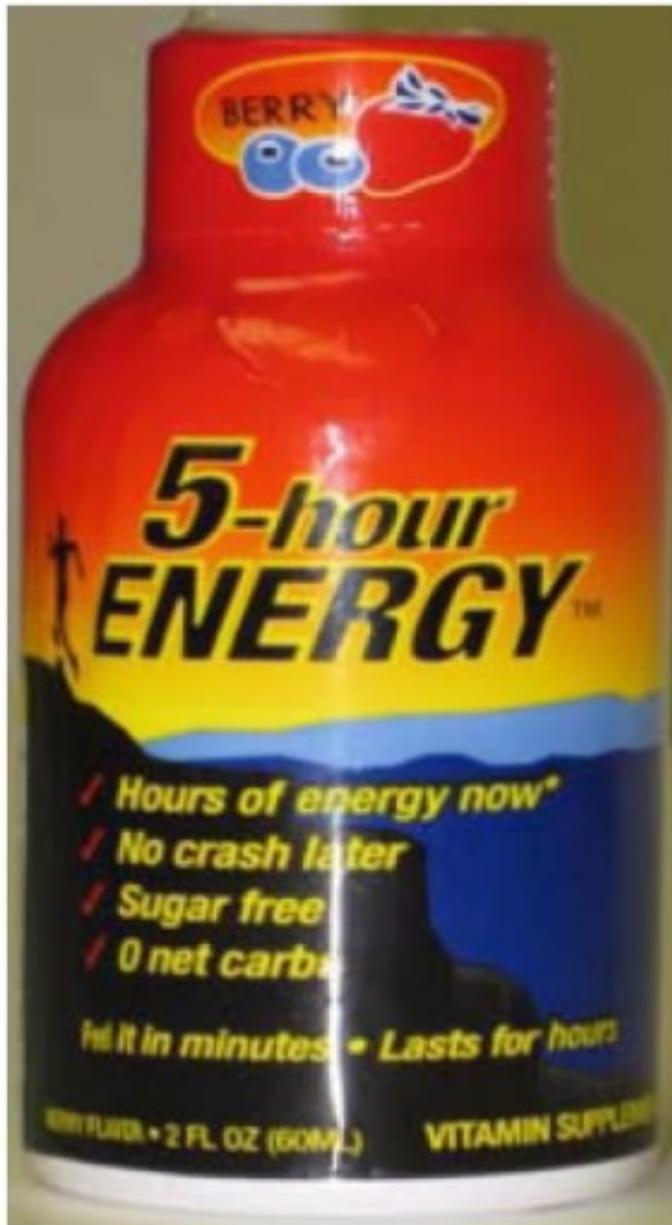
- generic words and symbols

(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?



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