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

• 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 "Crownsted" to shed rain. Of very tough substance, practically unsaarisable, yet soft and pliable. Has a smooth, sateen-like finish. Excellent for lightweight, Summer wear. Color is said 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, roomy pockets. Two lower pockets are bellows style. No. 485......... $16.00

Women's Safari jacket is same style as above. Sizes 16 to 48....................... $16.50

**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. Well cut and finished, with two front and two flap covered, hip pockets. No. 4848........ $8.00

Safari Breeches. Laced cuff style, cut especially to allow full freedom under all conditions. Made with double fronts. No. 4810........ $8.75

**SAFARI HOOD HELMET**

A slightly higher crown than the Safari Trout Helmet with a 2½ inch grommet underbrim, screen covered side vents and leather sweat band. No. 88150........ $3.75
## The Continuum of Distinctiveness

<table>
<thead>
<tr>
<th></th>
<th>Inherently Distinctive</th>
<th>Capable of becoming distinctive</th>
<th>Never distinctive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fanciful &amp; Arbitrary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suggestive</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Descriptive</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generic</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- KODAK cameras
- 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?
5-hour ENERGY™
- Hours of energy now
- No crash later
- Sugar free
- 0 net carbohydrates
- Feel it in minutes • Lasts for hours

STACKER 2
- Feel it Fast
- Energy that Lasts
- No Crash
- Enhance Concentration
- Improve Performance

ENERGY SHOT
- Sugar-free
- Very Berry

STACKER 2
- Berry Flavor
- 2 FL OZ (60mL)
- Vitamin Supplement