

# TRADEMARK & UNFAIR COMPETITION

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Class 6: Product Packaging and Product Configuration

# CLASS OUTLINE

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- Analyzing inherent distinctiveness of product packaging trade dress:
  - *Seabrook* factors
  - *Abercrombie* factors
  - 2<sup>nd</sup> 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



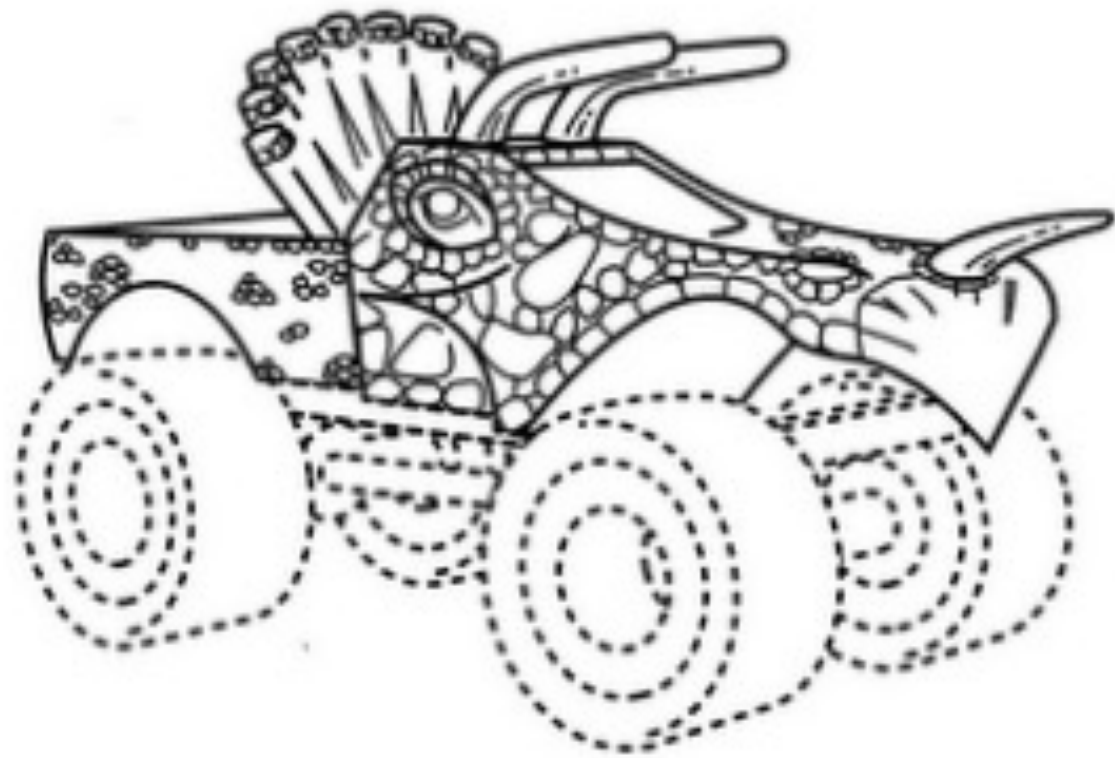




Water Bottle 001

3,221 Polygons





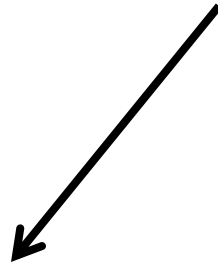




# Is the trade dress inherently distinctive?

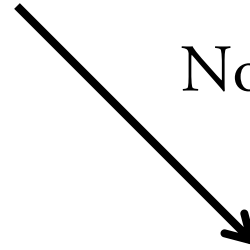
- (1) Does the trade dress in question belong to a category that the courts have said will never be inherently distinctive?
- Color (alone) – *Qualitex*
  - Product design/config. – *WalMart v. Samara*

Yes



No inherent distinctiveness - must show secondary meaning

No



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

## Is the trade dress inherently distinctive? (cont.)

- (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?

