



## Current Articles 2003 – October

### Trade Dress --- What is it ?

Recently, I was asked to review a case which was identified to me as a possible patent infringement liability case. In meeting with the lawyer and his client, the client indicated that the cause for the claim was "trade dress". Having never heard of trade dress I was concerned until the lawyer also admitted that he did not know what trade dress was.

Trade dress originated in the U.S.A. and claims for trade dress are increasing rapidly. To date it does not appear that there has been any trade dress claims in Canada but if we follow the American issues it may only be a short period of time before they commence in Canada.

Trade dress is defined as "as the total image of a product or business and may include shape, colour, texture, graphics or even sales techniques." As an example, if your client were to open a new restaurant and named it " Moonshine " and then installed a large purple sign with the letter "M" shaped like the familiar arches –this could be trade dress. Even though the colour of the sign (purple) is different, McDonald's could bring an action for trade dress as defined because of copying the shape of the letter "M".

Trade dress started when a company named Chantal brought an action against ECKO Group. Chantal manufacture tea kettles and claimed that ECKO's tea kettles so resembled Chantal's that they would likely cause confusion among consumers as to the source of the tea kettles. Chantal's claim – that they owned the trade dress rights in its tea kettles – was premised on the similarity of the overall appearance, visual impression, finish, size, shape contour, fixtures (handle), colour and materials of its tea kettles. Chantal alleged that their tea kettles were so well known that consumers had come to identify the tea kettles as a symbol of the company. Thus consumers would assume that ANY tea kettle with a similar design would be manufactured by Chantal.

Now, do we in Canada have available coverage for trade dress? The possible solution is by an Advertising Injury Endorsement. Although these wordings may differ slightly between insurers, many cover such things as "unfair competition" or others include "misappropriation of advertising ideas or style of doing business." These clauses may offer coverage for trade dress subject always to a court interpretation.

In 1998, the American policy wordings (ISO) were amended to include the term "trade dress" as an offence. They also included in the definition of Advertising Injury "infringement upon another's copyright, trade dress or slogan in your advertisement" and " the use of another's advertising idea in your advertisement". To clarify their intent they also included a definition of "advertising" as well as "advertising injury liability."

The standard American CGL includes Personal and Advertising Injury in their basic wording and subject to definitions conditions and exclusions. Advertising Injury Liability is an optional coverage or endorsement that is added to our Commercial General Liability. If we follow the court decisions in the U.S. A. we no doubt will see trade dress issues being brought before Canadian courts.

If you insure a manufacturer or distributor, does your policy include Advertising Liability? This would be even more important if your insured operates a location in the U.S.A. where the American courts are already settling trade dress issues.

**James E. Bonnay,**  
C.I.P., C.C.I.B.  
Insurance Consultant

Phone 905-333-1727  
Fax 905-333-0683  
E-mail - [jamesbonnay@cogeco.ca](mailto:jamesbonnay@cogeco.ca)