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Wrigley Field, the Trademark

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Wrigley Field, the Trademark

Abstract

This paper is about the theory of applying the law of trade dress and all the protections that come with it to stadiums, specifically to Wrigley Field, home of Major League Baseball's Chicago Cubs. Trade dress is the version of trademark reserved for the packaging, design, or color of products. If the packaging, design, or color possesses the ability to identify the source or creator of the product, then it can create a possessory interest in the product's creator for that style of packaging, design of the product, or color used. This possessory interest is used to protect the reputation of the creator as a producer of quality products and protect consumers from confusion when they go to purchase products.

During the last decade or more, sports have become big business and do not show any signs of stopping. One of the signs of this trend is the arms race that has developed for the biggest and best stadiums and facilities. Applying trade dress protection to these stadiums and facilities would protect an owner from the creation of a similar stadium or facility by a rival owner and could open up a new revenue stream by allowing that owner to use the look and design of his stadium to sell and market goods with. The application of this theory could be endless and only fully realized when it hits the free market.

Keywords

baseball, Wrigley Field, trademark, baseball stadium, Chicago Cubs, trade dress

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Benjamin J. Welch¹

TABLE OF CONTENTS

I. Introduction.....	45
II. Analysis	49
A. Introduction into the Law.....	49
B. Is the Stadium a Good or the Packaging of the Good?	52
1. The Supreme Court, Wal-Mart, and a Coke Bottle	52
2. The Sixth Circuit and Rock and Roll	59
3. Conclusion on Packaging v. Good	67
C. Is a Stadium too Functional to Enjoy Protection?.....	68
1. The Supreme Court, Traffic Signs, and Aesthetically Pleasing Things	68
2. The Fifth Circuit and a Mixed-Matched Golf Course	73
3. Conclusion on Functionality.....	77
D. Does a Stadium Require Secondary Meaning in Order to Garner Protection?	78
1. Mexican Food and Kids' Clothes	80
2. The Fifth Circuit in Pebble Beach	82
3. Wrigley Field is Inherently Distinctive	84
E. How Much of a Concern is Use in Commerce for a Stadium?	87
III. Conclusion	90

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I. INTRODUCTION

Could the owners of the Chicago Cubs and Wrigley Field own a trademark in Wrigley Field? Could the owner of the Boston Red Sox and Fenway Park own a trademark in the wall they call the Green Monster? What would this country look like if one person could own a property interest in a piece of Americana? Baseball is as much a part of America as apple pie and grilling out on the Fourth of July. The “Boys of Summer” play ball on everything from a sand lot next to a junkyard to the epic coliseums of Major League Baseball. The focus of this paper will be on the possibility of taking Wrigley Field, home of Major League Baseball’s Chicago Cubs, and getting trademark protection for the stadium itself. Furthermore, it will lay the groundwork for what a stadium owner must do in order to earn trade dress protection in their stadium.

One thing that becomes abundantly clear to anyone who spends anytime studying the world of sports is that it has become big business. Most recently, there has become an arms race of sorts to see who can build the nicest and newest stadiums. The city of Atlanta will be the hub of this arms race for the next couple years. The Atlanta Falcons of the National Football League will get a new home in 2017 that will cost them a mere \$1.5 billion, with \$1.3 billion of that coming directly from owner Arthur

Blank's pockets.² The newly dubbed Mercedes-Benz Stadium will also house one of Major League Soccer's newest clubs, Atlanta United.³ Cobb County has already broken ground on a new stadium that will move Major League Baseball's Atlanta Braves across town into a venture that will cost \$672 million.⁴ Outside of Atlanta, the National Basketball Association's newest venue will be in Sacramento, California, where the Kings will lace 'em up in the new \$507 million Golden 1 Center starting in 2016.⁵

Those three stadiums in two cities will serve four teams and will cost a combined total of \$2.68 billion, which is more than a fifth of what the entire National Football League made in 2013-14.⁶ Teams invest in building stadiums in the hopes of attracting more fans, better players, and more victories. But what if teams could also profit off of the building itself? Or conversely, what if a team like the White Sox could build an exact replica of Wrigley Field on the South Side of Chicago in a move to draw money

² Maria Saporta, *New Falcons Stadium Costs 'Rise Up' –Again – Another \$100 Million*, ATLANTA BUSINESS CHRONICLE, (Apr. 13, 2015), <http://www.bizjournals.com/atlanta/news/2015/04/13/new-falcons-stadium-cost-rises-up-again-another.html>.

³ Atlanta Falcons, *Mercedes-Benz Named Partner of New Stadium*, <http://www.atlantafalcons.com/news/new-stadium/article-1/Mercedes-Benz-Named-Partner-of-New-Stadium/bded0da1-6b84-4fb0-b548-3ebb8ce36322> (last visited Oct. 18, 2015).

⁴ Cobb County Gov't, *New Atlanta Braves SunTrust Park FAQ*, http://www.cobbcounty.org/index.php?option=com_content&view=article&id=2713&Itemid=698 (last visited Oct. 18 2015).

⁵ Dale Kasler, *Sacramento Completes Kings Arena Financing with \$272.9 Million Bond Sale*, THE SACRAMENTO BEE, (Sept. 24, 2015), <http://www.sacbee.com/news/local/city-arena/article36414231.html>.

⁶ Brent Schrotenboer, *NFL Takes Aim at \$25 Billion, but at What Price?*, USA TODAY, (Feb. 5, 2014), <http://www.usatoday.com/story/nfl/super/2014/01/30/super-bowl-nfl-revenue-denver-broncos-seattle-seahawks/5061197/>.

and fans away from the Cubs? Is there any protection to keep the White Sox from doing that? Yes, and that protection is rooted in trademark. Along with that protection, allowing owners to earn trademark protection in their stadiums would create a new revenue stream for them. T-shirts and snow globes of Wrigley Field would fill the team stores on game days and teams would be able to limit and control what third parties could sell those items through their ownership of that mark.

This paper looks at the possibility of getting trade dress protection on a stadium, with specific focus on Wrigley Field. Once an owner acquired trade dress protection, they would own a valid trademark on the stadium. With this trademark they could stop anyone else from using or selling anything with the likeness of the stadium on it. That owner would also be able to put a stop to any other baseball teams from building a similar stadium or using too many similar aspects of his stadium when constructing their own. Profit is made in trademark by either being known as the best supplier of goods, so customers come to you and you only; selling items with your mark on it; or by licensing out your mark for others to use, which creates a revenue stream of royalties. The possibilities of these new revenue streams becoming available to owners of stadiums would add incentive when they're debating spending billions of dollars to construct new ones or when they need assistance in keeping an older stadium profitable.

This paper will lay the ground work of how stadiums receive trade dress protection and set up the future discussions of how to turn that protection into new revenue streams. First, stadiums are adequate subject matter for trade dress protection, specifically as the packaging of the good (here, a Cubs game). Second, I will show that stadiums are not too centered on functionality as to prohibit them from receiving trade dress protection. Third, I will prove that, if a court so requires, stadiums have adequate secondary meaning to garner trade dress protection. Lastly, trademarks and trade dress must be used in commerce, and I will close by showing that stadiums are used in commerce.

In Part II, Section A of this paper, I will walk you through an introduction to the law of trademark and trade dress. Section B will explore the issue of whether or not a stadium is the packaging of the good (which I claim it is) or the good itself (as similar subject matter was held to be by the Sixth Circuit). The issue of functionality will be taken up in Section C. In that section, I will prove that Wrigley Field has enough arbitrary features to take it above the functional threshold and into something deserving trade dress protection. Section D looks at the issue of secondary meaning; and then this paper will close with Section E and the stadium's use in commerce.

II. ANALYSIS

A. Introduction into the Law

Before one can appropriately grasp the world of trade dress, it would help to have some understanding on trademark law and how one obtains a trademark. Everyone has seen a trademark. They're usually signified by a small "TM" or an "R" enclosed in a circle next to the logo of a company. A trademark is defined as any word, name, symbol, or device, or any combination thereof used by a person, or which a person has a bona fide intention to use in commerce, 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.⁷ A simpler definition is that a trademark is any word or symbol used by a person in commerce to identify or distinguish the source of their goods. Notice that, in its definition, it is the intention of trademarks to identify the source of a good, not the good itself.

Think of a man, let's call him Mr. Icarus, and let's imagine he has invented the first working solar powered car. He has taken the roof of a normal-looking, four-door sedan, and installed solar panels that absorb the sun's light and use the energy generated by the panels to power the car's battery and run the vehicle's engine. After all of his patents are in order for

⁷ See 15 U.S.C. § 1127 (2006).

the technology, Mr. Icarus' next concern is to create a business and start selling his car. He decides to name the company *Carro del Sol*.⁸ After meeting with a marketing firm, Mr. Icarus adopts a logo with a steering wheel superimposed on the sun and decides to advertise his cars with the tagline: "Let the sun power your life." Every car his company produces gets "*Carro del Sol*" placed on the rear of the car, near the left taillight, and the logo of the steering wheel superimposed on the sun placed on the front and rear of the cars, right in the middle. Every advertisement for his cars includes the tagline somewhere in it. The name of the company, *Carro del Sol*, is a name, the logo is a symbol, and the tagline is a combination of words and all three can get trademark protection. Once the name and logo are placed on the cars for sale and the tagline inserted into all advertisements, Mr. Icarus and his company are officially using them in commerce to identify their company as the source of the cars that are being sold.

Now, imagine you've bought a *Carro del Sol* and want to show it off to the girl down the street by taking her out to dinner and a movie. The movie theater you choose has been designed to feel like a drive-in theater. The lobby feels like you're outside, with green carpet that looks like grass, and the moon surrounded by stars on the ceiling. When you walk into the

⁸ Spanish for "Car of the Sun."

theater, every two seats are set up like the seats of an old car. Speakers are on either side of your seats, just like they would be in a drive-in. Can the movie theater get any protection in this atmosphere they've created? Yes, they can get trade dress protection. Traditionally, trade dress has been defined as the overall appearance of labels, wrappers, and containers used in packaging a product.⁹ However, today, that has been expanded to the overall appearance and image in the marketplace of a product or commercial enterprise.¹⁰ There are three types of trade dress, product configuration or design, product packaging, and color.¹¹ Product configuration or design is defined as the shape or overall appearance of a product, for instance a special design to Mr. Icarus' cars that make them distinguishable from other cars.¹² Product packaging is defined as the overall look and feel of a product, for instance the drive-in theater atmosphere of the movie theater to which you took your date.¹³ Color is self-explanatory and can be looped in with packaging and configuration, at times, but is available to potential trademark owners as its own mark.

This paper is concerned with product packaging. In the movie theater example, you are taking your date to go see a movie, that's the good

⁹ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:1 (THOMSON REUTERS EDS., 4TH ED. 2015).

¹⁰ DARIUS C. GAMBINO & WILLIAM L. BARTOW, TRADE DRESS: EVOLUTION, STRATEGY & PRACTICE 22 (Lexis Nexis eds., 2015).

¹¹ *See id.* at 23.

¹² *Id.* at 25.

¹³ *Id.* at 29.

you are purchasing. However, you chose that movie theater because it packages the movie watching experience in a unique manner, as a drive-in. This paper takes the same idea and applies it to stadiums, specifically Wrigley Field in Chicago, Illinois, home of Major League Baseball's Chicago Cubs. The issue before you is this: can a baseball stadium get trade dress protection as the packaging of the experience of watching a baseball game?

B. Is the Stadium a Good or the Packaging of the Good?

This analysis will begin with determining whether or not a stadium is the type of subject matter that can be trademarked. A trademark may only be given to a word, name, symbol, or device that is used to identify the source of a good.¹⁴ A trademark cannot be given to the good itself. The baseball game played within Wrigley Field is the good consumers purchase and Wrigley Field is the package in which the good is delivered. Because it is the package in which the good comes in, anyone seeking trademark protection in Wrigley Field must do so through trade dress protection as the product packaging. As a reminder, product packaging is defined as the overall look and feel of a product.¹⁵

1. The Supreme Court, Wal-Mart, and a Coke Bottle

¹⁴ See 15 U.S.C. § 1127 (2006).

¹⁵ GAMBINO, *supra* note 21, at 29.

The analysis into this issue finds its beginnings with an analogy Justice Scalia made in a trademark case focused on secondary meaning. In 2000, the Supreme Court decided *Wal-Mart Stores, Inc. v. Samara Bro., Inc.*, 529 U.S. 205 (2000). In that case, the plaintiff, Samara Brothers, Inc., brought suit against Wal-Mart Stores, Inc. and five other corporations for infringement of unregistered trade dress.¹⁶ Because this case revolves around secondary meaning, I will save the deeper analysis into it for later in Section D of this paper. For now, I will just focus on what Justice Scalia did with an analogy he used to strengthen his opinion and what issues he raised by making that analogy.

The analogy Justice Scalia proposed is found towards the end of the Court's opinion. Wal-Mart argued that the Court's holding in their case (requiring secondary meaning for product design but not product packaging) would force courts to draw difficult lines between product design and product-packaging trade dress. Here is Justice Scalia's response:

There will indeed be some hard cases at the margin: a classic glass of Coca-Cola bottle, for instance, may constitute packaging for those consumers who drink the Coke and then discard the bottle, but may constitute the product itself for those consumers who are bottle collectors, or part of the product itself for those consumers who buy Coke in the classic glass bottle, rather than a can, because they think it more stylish to drink from the former.¹⁷

¹⁶ *Wal-Mart Stores, Inc. v. Samara Bro., Inc.*, 529 U.S. at 208 (2000).

¹⁷ *Id.* at 215.

What Justice Scalia has done here is draw a line for future analysis on what exactly is the good and what exactly is the packaging of the good. Scalia creates three different groups of consumers and all three see the bottle of Coke different ways. Scalia's first group of consumers is the group interested in drinking a Coke and will just see the bottle as the holder or the packaging of what they wish to drink. They will see the liquid as the final good they are purchasing. One would tend to think that this would represent the larger of the groups presented by Scalia. On the other hand, the second group of consumers Scalia presents is bottle collectors. They are the group that sees the bottle itself as the good. They purchase the Coke for the bottle and see the liquid inside as inconsequential to their end goal. Scalia's first two groups of consumers see a bottle of Coke in completely opposite lights, and they happen to be the two groups relevant to this paper, but I momentarily digress. Lastly, Scalia's third group of consumers is a mix of the two. This third group wants to drink the Coke; that is the good they are thirsting for. However, they prefer it from a glass bottle. This third group wants everything the first two do, but they want it at the same time and place. We have no evidence whether they plan on keeping the bottle as a collector's item after they finish their Coke, but we can see that collecting the bottle isn't their first priority. To them, the bottle provides the best medium or package of the good that is the Coca-Cola. For the purposes of

this paper, I won't spend any more time dealing with this third group. The rest of the analysis will examine the line between the first two groups of consumers.

The line between Scalia's first two groups of consumers is drawn by their view of what the good is. In terms of Wrigley Field, Scalia's first group of consumers comes to the games to watch baseball. To them, Wrigley Field is the package that delivers that good. Assuming most are Cubs fans, their other options are to watch the game on a television or follow the team to road games played in different stadiums. I'm sure Wrigley Field holds some special significance to them, whether that's based on its history or their previous experiences in Wrigley, but for the most part, their main goal when walking into the stadium is to watch baseball and the significance of Wrigley Field is somewhat inconsequential to the game.

Shifting now to Scalia's second group of consumers, we are faced with an issue fairly unique to stadiums, especially baseball ones. Have you ever heard of people wishing to watch a game in every baseball stadium in the country? This was a big deal when old Yankees Stadium was being demolished. I heard many of my own friends expressing their desire to see a game there before it was gone or making plans to go see the new Yankees Stadium after it was opened. Anyone could have played in that stadium that day; the good for them was being in the stadium. In a way, being there was

like collecting a Coke bottle. It's not just my friends either. There are multiple internet articles suggesting the best way to hit all thirty Major League Baseball stadiums in as little as thirty days; one even provides an algorithm you can use to best plan your trip.¹⁸ There is also a website dedicated to people going to different MLB ballparks and sharing their pictures and experiences.¹⁹ Want to catalogue your adventures? One site will sell you an MLB Ballpark Passport Book, so you can make sure you don't miss one.²⁰ Not interested in taking a road trip across the country in 30 days seeing all the parks? Book your own trip at your own pace through a travel agency called, Big League Tours.²¹ You can pick your tour on the basis of month, region, or particular stadiums you wish to see on your trip.²² This is a unique consumer base for baseball stadiums. These consumers are the personification of the second group Scalia mentions. Just like the Coke is an afterthought to the bottle, they are the fans who watch the baseball in order to get the experience of the stadium.

¹⁸ Eric Brewster and Ben Blatt, *Take Me Out to the Ballpark—All of Them*, SLATE, May 5, 2014, http://www.slate.com/articles/sports/sports_nut/2014/05/baseball_road_trip_how_to_visit_all_30_mlb_stadiums_in_30_days.html (last visited Oct. 21, 2015); *see also* *How to Plan a MLB Road Trip: 30 Parks, One Summer*, THE ART OF MANLINESS, December 4, 2011, <http://www.artofmanliness.com/2011/10/12/how-to-plan-a-mlb-road-trip/> (last visited Oct. 21, 2015).

¹⁹ BALLPARK CHASERS, <http://www.ballparkchasers.com/> (last visited Oct. 21, 2015).

²⁰ *Id.*

²¹ BIG LEAGUE TOURS, <http://www.bigleagueetours.com/> (last visited Oct. 21, 2015).

²² *Id.*

Nowhere in Scalia's analogy does he set a mark as to what size this second group must reach in order to affect the view that the bottle or stadium shifts from the packing of the good to the good itself. However, one would assume that there must be some point at which there is that shift. It should be helpful to look at some numbers to gauge an idea of where that point may be or decide whether or not this is even worth the worry of owners of stadiums.

A useful database to go get numbers from is ticket sales. Ticket sales show how many people are at a game at a single time and give some insight into the motives of each individual's purchasing decision. During the 2014-15 offseason, the Chicago Cubs made some additions to Wrigley Field, but kept overall capacity of the stadium to 42,495 seats.²³ They added a new video board in the outfield, which took away some original seating, but added more bleachers to compensate and keep their number relatively the same as before the new video board.²⁴ In 2014, the team reported that they had between 7,000 and 8,000 season-ticket account holders.²⁵ For the purposes of this paper, I will arbitrarily use the number 7,500 for number of season-ticket accounts. Now, it's doubtful each account has solely one

²³ Chris Hine, *Wrigley's New Bleachers: Most Dramatic Change Since 1937*, CHICAGO TRIBUNE (May 5, 2015), <http://www.chicagotribune.com/sports/baseball/cubs/ct-wrigley-bleachers-spt-0505-20150504-story.html>.

²⁴ *Id.*

²⁵ Danny Ecker, *Cubs Raising Season-Ticket Prices on Best Seats in 2015*, CRAIN'S CHICAGO BUSINESS (Sept. 4, 2014), <http://www.chicagobusiness.com/article/20140904/BLOGS04/140909929/cubs-raising-season-ticket-prices-on-best-seats-in-2015>.

season-ticket on it. From my brief experience working as a graduate assistant in a university's ticket office, it wouldn't be a stretch to imagine that most season-ticket account holders buy between two and four tickets, which excludes the corporate accounts, who buy tickets in the double digits, throwing off any chance at an average calculation. So, 7,500 ticket accounts are buying on average three tickets (arbitrarily picked number between two and four) per account. That means that, of the 42,495 seats in Wrigley Field, 22,500 are owned by season ticket holders, which happen to be more than fifty percent of the stadium. It should be safe to assume that all of these season ticket holders are in Scalia's first group of consumers, because who would buy a full season ticket package to experience the stadium and not the baseball games? Adding in the local Chicagoans buying smaller ticket packages or single game tickets to go see their Cubs play, it is safe to assume that more people than not are in Wrigley Field because they are Cubs fans wishing to experience the baseball game. By my math, the majority of people in the stadium on a daily basis are Scalia's first group of consumers. It would not be surprising to see similar numbers for all baseball stadiums in this country; and even less surprising to discover that these percentages are actually being undersold. Therefore, it is not realistic that Scalia's second group of consumers would ever reach a high enough percentage of stadium attendance to cause Wrigley Field to be seen as the

good, as opposed to the packaging of that good. It is definitely a unique situation for owners of stadiums like Wrigley Field to be concerned with Scalia's second group of consumers, but the numbers show that the concern with this second group is de minimis, at best, for purposes of trademark analysis. The majority of consumers in Wrigley Field are there to watch the Cubs. The good they seek is the baseball game inside the package that is Wrigley Field.

2. The Sixth Circuit and Rock and Roll

Before moving on to the second issue, precedence against Wrigley Field receiving trade dress protection does exist. In 1998, the Sixth Circuit held that the Rock and Roll Hall of Fame was “not [] a separate and distinct mark on the good, but, rather, [] the good itself.”²⁶ A museum and a stadium are similar in the fact that both are buildings, popular for tourism and used to house attractions. Their similarity warrants some analysis into this case. If the Sixth Circuit's reasoning is persuasive on other courts, stadiums, like the museum at issue in this case, could likely be held to be the good rather than the packaging. This would mean that stadiums wouldn't be proper subject matter for trade dress protection, thus making this paper irrelevant. However, the view of the Sixth Circuit in regard to the Rock and Roll Hall

²⁶ *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prod.*, 134 F.3d 749, 754 (6th Cir. 1998).

of Fame as the good was improper and should not be a bar against Wrigley Field or any stadium seeking trade dress protection.

a. The Facts

In 1991, the Rock and Roll Hall of Fame Foundation (“Foundation”) commissioned the design and construction of the Rock and Roll Hall of Fame and Museum (“Museum”).²⁷ The Museum was built on the bank of Lake Erie in Cleveland, Ohio and was opened in 1995.²⁸ What they ended up constructing is a building unlike any other and described by the Foundation as “a unique and inherently distinctive symbol of the freedom, youthful energy, rebellion, and movement of rock and roll music.”²⁹ As opposed to choosing an attic to store all the relics, the Foundation went out and hired I.M. Pei, a famous architect at the time and possibly the only living architect whose name would be recognized by more than a handful of Americans (as jokingly pointed out by the Dissent), to design it.³⁰ In 1996, the State of Ohio granted them registration of the Museum’s design for trademark purposes.³¹ During the time of this appeal to the Sixth Circuit, the Foundation also had an application pending with the United States Patent and Trademark Office for the design of the Museum.³²

²⁷ *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 750.

²⁸ *Id.*

²⁹ *Id.* at 751.

³⁰ *Id.* at 757 (Martin, J., dissenting).

³¹ *Id.* at 751.

³² *Id.*

The Foundation brought this lawsuit against Charles Gentile and his company, Gentile Productions (collectively “Gentile”), after Gentile began selling posters of the Museum with a sunset in the backdrop.³³ The Foundation sold a similar poster of their Museum.³⁴ Gentile’s poster was taken from ground-level, when the Museum appears to be closed, includes nothing but the Museum and the sunset, and is dubbed as “artistically appealing”³⁵ by the Sixth Circuit.³⁶ The Foundation’s poster, on the other hand, was taken from an elevated vantage point, during the Museum’s opening night, with a red carpet out front and interior lights shining.³⁷ The Foundation’s poster was also deemed “artistically pleasing,” but the Court finds it to be very different from Gentile’s poster.³⁸

However, the poster wasn’t the only item the Foundation sold with the Museum pictured on it. The Foundation presented evidence of an advertisement for the Museum’s opening night, a paper weight, several postcards, and two t-shirts, all of which were or had a picture of the Museum’s exterior on it.³⁹ The Foundation coupled that with an affidavit from the controller of the Museum, who stated that “the Museum ha[d] used versions of the building shape trademark on T-shirts and a wide variety of

³³ *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 751.

³⁴ *Id.*

³⁵ Phrasing that, if used in copyright law, would make Justice Holmes roll over in his grave (*See* *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 293 (1903)).

³⁶ *Rock & Roll*, *supra* note 33, at 752.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

products, including posters, since as early as June, 1993,” which is two years before the Museum was opened.⁴⁰ The affidavit continued to state that merchandise that included or featured the exterior shape of the Museum was among the top selling items, according to sales reports.⁴¹ The district court held that the Foundation’s extensive advertising and promotional activities using the Museum’s design were enough to garner trademark protection and found Gentile infringing their trademark.⁴² However, that was not enough to convince the Sixth Circuit as they held that there was no trademark protection in the Museum’s building design.⁴³

b. Sixth Circuit’s Landmark Issue in Rock & Roll

On appeal, the Sixth Circuit specifically states that it overrules the district court’s ruling because it was not persuaded that the Foundation used the design of the exterior of the Museum as a trademark.⁴⁴ The key statement made by the Court for the purposes of this paper is as follows: “the [Foundation’s] building strikes us not as a separate and distinct mark *on the good*, but, rather, as the good itself.”⁴⁵ This statement of the Sixth Circuit could be damning for any stadium trying to obtain trade dress protection. As stated earlier, trademark can only be given for a word,

⁴⁰ *Rock & Roll*, *supra* note 33, at 752.

⁴¹ *Id.*

⁴² *Id.* at 752-53.

⁴³ *Id.* at 755.

⁴⁴ *Id.* at 754.

⁴⁵ *Id.* at 752.

symbol, or device that identifies the source of a good. Trademark protection is not extended to the good itself. If a building like a museum or baseball stadium is actually the good, then how can they also be the packaging of that good and identifiers of source? In order to understand why the Sixth Circuit ruled this way, it is necessary to break down its reasoning behind it. The Sixth Circuit's issue had to do with its perception of what the building actually was, which this paper will show was a flawed view.

The Court here seems to struggle with the fact that the Museum is a Cleveland landmark. Gentile brought the Court evidence of articles for sale around the city, which depicted the Museum with other Cleveland landmarks.⁴⁶ When the Court looked at Gentile's poster of the Museum at sunset in the light of this other evidence, it did not see an indicator of source.⁴⁷ Instead, it saw "an accessible, well-known, public landmark."⁴⁸ This is a problem for the Court because no landmark stands for anything but itself. There are no source identifying qualities of a landmark. With few exceptions, one does not stand in a town square, looking at a bronze sculpture of a soldier, and identify the source of who made the sculpture. People simply see the sculpture. A landmark is defined as a prominent identifying feature of a landscape or a fixed marker of a boundary line.⁴⁹

⁴⁶ *Rock & Roll*, *supra* note 33, at 752

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ "1) A prominent identifying feature of a landscape. 2) A fixed marker, such as a

The point of a landmark is to be seen, to mark something, or for people to recognize it. There might be some reason we know it, whether for historical or boundary purposes, but its purpose is to be seen and recognized. Think of a statue in a town square. There's no source attached to it. It's simply there for you to appreciate or for you to use when telling someone they need to go down three blocks and take a right when they reach the statue of the bronze soldier.

However, this was not the purpose of the Museum and it's not the purpose of Wrigley Field. Their purposes are what they house inside. A museum is defined as a building used for the acquisition and study of objects of scientific, historic, or artistic value.⁵⁰ A stadium is defined as a structure for sporting events with seating for spectators.⁵¹ It's fairly clear from these definitions alone that the true purpose of museums and stadiums are to house things inside. Here, the Museum is built for rock and roll fans to come and experience the greats of the past. It's housing an acquisition or collection of objects of historical value. Wrigley Field is traveled to so fans

concrete block, that indicates a boundary line. 3) An event marking an important stage of development or a turning point in history. 4) A building or site with historical significance, especially marked for preservation by municipal or national government," *Landmark*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

⁵⁰ "A building, place, or institution devoted to the acquisition, conservation, study, exhibition, and educational interpretation of objects having scientific, historical, or artistic value," *Museum*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

⁵¹ "1. A large, usually open structure for sporting events with tiered seating for spectators. 2. A course on which foot races were held in ancient Greece, usually semicircular and having tiers of seats for spectators," *Stadium*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

of the Chicago Cubs can come see their team play baseball. It's a structure for sporting events. It seems clear that, by just looking at the definition of landmark, museum, and stadium, that the Museum's purpose is not to solely be recognized as just another mark on the Cleveland skyline. The building itself is there to house and preserve the history of rock and roll. It's there as the packaging for which the Foundation uses to deliver its good; and its good is history. Likewise, even though Wrigley Field has been around for 101 baseball seasons and has become a prominent fixture in the city of Chicago, its purpose is to house baseball games.

The Sixth Circuit seems correct in the fact that a landmark cannot get trade dress protection. However, the Sixth Circuit erred in its view of what the Museum actually stood for and this error threw off the rest of its analysis. It's understandable how and why they erred. The evidence shown by Gentile proved that there was a group of consumers that viewed the Museum as a landmark and appreciated it for its beauty, in line with Scalia's second group of consumers. However, there should have been trade dress protection on the Museum as a product package because the Sixth Circuit should have known (or the Foundation's lawyers should have brought evidence that countered Gentile's and showed) that the majority of consumers saw the Museum as a house for the history of rock and roll and that the history was the good consumed. Likewise, a proper appreciation of

the purpose of Wrigley Field and the majority view of consumers that it is a house for a baseball game will not disrupt its ability in being granted trade dress protection.

c. The Dissent

Sixth Circuit Chief Justice Martin wrote the dissenting opinion in *Rock & Roll*, and, unlike the majority opinion, he actually spent some time walking through the same analogy that Scalia did in *Wal-Mart*. The Coke bottle has dual purposes in Justice Martin's eyes.⁵² It allows the customer to immediately identify what is inside the bottle and it serves a utilitarian function of actually holding the Coke.⁵³ In the same way that the bottle is the physical structure holding the Coke, Justice Martin sees the Museum as the physical building that holds tangible and intangible elements related to the art that is rock and roll.⁵⁴ It can be assumed that the majority of people visiting the Museum are there for what is actually inside it. They fit into Scalia's first group of consumers. They are the group who recognize Justice Martin's idea that the good is actually inside the building. They come to the Museum for the tangible and intangible elements of rock and roll that are housed inside the walls of the museum. Justice Martin understood what Justice Scalia was saying in his analogy of the Coke bottle and Justice

⁵² *Rock & Roll*, *supra* note 38, at 756 (Martin, J., dissenting).

⁵³ *Id.* at 756-57.

⁵⁴ *Id.* at 757.

Martin was correct when he believed the Foundation should be able to get trade dress protection on the Museum.

3. Conclusion on Packaging v. Good

To conclude, Wrigley Field is the packaging that the good the consumers seek comes in. Whether you look at ticket sales or the definition of what a stadium is, it should be clear that Wrigley Field houses baseball games and the majority of consumers come for those baseball games. In remembering Justice Scalia's groups of consumers, Wrigley Field does attract some of the second group of consumers, but the vast majority of fans attending are the first group of consumers that see the stadium as the packaging. However, the Sixth Circuit has provided some precedence against granting buildings such as stadiums trade dress protection. It viewed the Rock and Roll Hall of Fame as a Cleveland landmark. This view made the Hall of Fame the good and not the housing of historical goods, of which people come to view. While correct in its analysis that landmarks should not be granted trade dress protection, the Sixth Circuit was wrong in ruling that the Hall of Fame was a landmark. The Hall of Fame and Wrigley Field are not the good; they are merely the packaging that houses the history of rock and roll and the Chicago Cubs. Wrigley Field is the proper subject matter to obtain trade dress protection.

C. Is a Stadium too Functional to Enjoy Protection?

Trademarks protection cannot be extended to functional objects. This is the likely biggest hurdle stadium owners must overcome in their pursuit for trade dress protection. The functionality doctrine draws a line between promoting competition by protecting reputation and allowing an overreach by creating monopoly control over useful features.⁵⁵ It's the duty of patent and copyright law, not trademark law, to encourage inventions by granting the inventor a monopoly over new product designs or functions for a limited time.⁵⁶ Any claims of functionality can be overcome by incorporating enough arbitrary features to the stadium that provide no functional benefits to it. Wrigley Field, especially, adds enough to the simple function of a stadium to cross this hurdle and remain subject matter fit for trade dress protection.

1. The Supreme Court, Traffic Signs, and Aesthetically Pleasing Things

There are two types of ways potentially protectable marks can be functional, either aesthetically or by being useful. This paper will start with analysis into the usefulness of items, called utilitarian functionality, before moving on to aesthetic functionality.

a. Utilitarian Functionality

⁵⁵ *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 164 (1995).

⁵⁶ *Jacobson Products Co., Inc.*, 514 U.S. at 164.

The Supreme Court ruled on the premier case on utilitarian functionality in 2001. In *TrafFix*, Marketing Displays, Inc. (“MDI”) held two expired utility patents for a mechanism built upon two springs to keep signs upright against wind.⁵⁷ After the patents expired, TrafFix Devices, Inc. (“TrafFix”) sent MDI’s product overseas to be reverse engineered and copied.⁵⁸ TrafFix then started selling their own version of the two-spring product under a similar name.⁵⁹ MDI believed that the two springs holding up their product and being visible to customers was recognizable as a symbol for their product.⁶⁰ They decided to bring a trade dress infringement suit against TrafFix for TrafFix’s use of this dual-spring design.⁶¹

The Court reiterates its well-established rule that trade dress protection may not be claimed for product features that are functional.⁶² This rule has been furthered by burdening the person who asserts trade dress protection as the one who must prove the features are not functional.⁶³ A feature is functional if it is essential to the use of purpose of the article or if it affects the cost or quality of the article.⁶⁴ An example of something being essential to the purpose of the article is tires on cars. Our friend, Mr. Icarus, cannot get trade dress protection purely on the four tires his cars

⁵⁷ *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 25 (2001).

⁵⁸ *Id.* at 26.

⁵⁹ *Id.*

⁶⁰ *Marketing Displays, Inc.*, 532 U.S. at 25.

⁶¹ *Id.* at 26.

⁶² *Id.* at 29.

⁶³ *Id.*

⁶⁴ *Id.* at 32.

come with because a car wouldn't be able to roll down the road without them and the purpose of a car is to move down the road. Tires are essential to the use of a car. Think about leather seats for something affecting the cost or quality of an article. For most cars, having leather seats is an upgrade that raises the value of the car and the perception of the buyer; in other words, having leather seats affects the cost and quality of cars. Therefore, Mr. Icarus could not get trade dress protection on any leather seats he installs into his vehicles. The policy in adhering to this doctrine is the fear that granting trade dress protection for functional features would put competitors at a significant non-reputation-related disadvantage.⁶⁵ However, one can show the features are not functional by showing they are merely ornamental, incidental, or arbitrary aspect of the device.⁶⁶ For example, Mr. Icarus adds tail fins to each of his vehicle and these tail fins resemble flames coming from the sun. They're not necessary for the functioning of the car, in that they don't actually help the car get down the road; they're merely ornamental additions.

MDI was unable to point to anything arbitrary about the components of the dual-spring device or the way it was assembled.⁶⁷ Therefore, the Supreme Court held that the dual-spring design was not arbitrary, but, in

⁶⁵ *TrafFix Devices, Inc.*, 532 U.S. at 32.

⁶⁶ *Id.* at 30.

⁶⁷ *Id.* at 34.

fact, it was “*the reason the device works*” (emphasis added).⁶⁸ MDI’s trade dress was denied because the springs were necessary to the operation of the device.⁶⁹

Applying this to Wrigley Field, it must first be determined as to what is the purpose of Wrigley? In *Traffix*, the purpose of the traffic signs were to stand up and direct traffic and the springs held up the traffic signs, which is pretty vital to the signs serving their purpose. The purpose of Mr. Icarus’ cars is to drive and be powered by the sun. Wheels are vital to that, but tail fins are not. The purpose of Wrigley Field, as sufficiently made clear through the discussion in the last section, is to host baseball games and give space for fans to spectate. The aspects of Wrigley that make that work are the seats, the field, the lights, the dugouts, the locker rooms, and anything else directly tied to the workings of a game. However, features like the ivy on the outfield wall are a part of the overall feel of Wrigley. And, instead of contributing to the workings of the game, it actually hinders a baseball game when balls get lost inside it. The famous red sign welcoming fans out front, the seats on the rooftops of surrounding buildings, and the luxury suite in center field that serves as the “batter’s eye” are all arbitrary or ornamental additions to Wrigley Field that don’t serve any purpose assisting with the hosting of a baseball game. By

⁶⁸ *Traffix Devices, Inc.*, 532 U.S. at 34.

⁶⁹ *Id.* at 30.

incorporating enough arbitrary and ornamental items, like these, stadiums will be able to overcome this utilitarian functionality bar and be eligible for trademark protection.

b. Aesthetic Functionality

A design is functional because of its aesthetic value only if it confers a significant benefit that cannot practically be duplicated by the use of alternative designs.⁷⁰ The ultimate test for aesthetic functionality is whether or not the recognition of trademark rights would significantly hinder competition.⁷¹ Courts have denied trademark or trade dress protection for the baroque style of decoration on silverware; casual clothing with primary color combinations with solid, plaid and stripe designs made from cotton, wool and twill fabrics; and a heart and arrow-shaped spoon.⁷²

What are the aesthetic aspects of Wrigley Field or what gives Wrigley Field its aesthetic value? Well, just about everything to do with Wrigley Field makes it one of the most beautiful places for a baseball game. People find beauty in the older look and the historical feel. Other's love when the sun is shining bright over the ivy and the way the Cubs' white jerseys with those blue pin stripes look on the green, green grass.

⁷⁰ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7.80 (Thomson Reuters eds., 4th ed. 2015).

⁷¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 (AM. LAW INST. 1995).

⁷² MCCARTHY, *supra* note 70 § 7:80.

Everything about Wrigley Field is aesthetically pleasing. At first, this doesn't look good for Wrigley Field.

However, we must look at any alternative means or whether or not giving Wrigley's aesthetically pleasing features trademark protection would provide them an unfair advantage over competitors. This answer is simple. There's twenty-nine other Major League Baseball teams, and all have their own stadium, none of which look like Wrigley. Yet they all are able to get fans to attend their games. As a person who has spent most of his baseball-viewing experiences in Tropicana Field,⁷³ a dome stadium with a stingray tank in right-center field replacing ivy on the walls, I will attest that stadiums can be built different ways and fans will still attend. In fact, during the 2015 MLB season, five other teams had higher attendance during the season than Wrigley had.⁷⁴ Therefore, granting Wrigley Field trade dress protection wouldn't give any other baseball teams an unfair advantage in drawing their own fans to the game, and aesthetic functionality should not be a bar against Wrigley Field being granted trade dress protection.

2. The Fifth Circuit and a Mixed-Matched Golf Course

The Fifth Circuit was able to apply functionality to a similar commodity as Wrigley Field. In 1998, three nationally-known golf courses

⁷³ Tropicana Field is home to the Tampa Bay Rays and one of the ugliest baseball stadiums in America.

⁷⁴ BASEBALL REFERENCE, *2015 Major League Baseball Attendance & Miscellaneous*, <http://www.baseball-reference.com/leagues/MLB/2015-misc.shtml> (last visited Mar. 7, 2016).

brought a trademark infringement action against a course in Texas that was copying certain golf holes. The court granted one of the courses trade dress protection in their golf hole. That ruling was based more on secondary meaning, but the court does do a good job of walking through a functionality analysis before getting to that point. This case is included because both baseball stadiums and golf courses find themselves in the business of sport.

a. Facts of Pebble Beach

In 1998, the Fifth Circuit heard a case for trade dress infringement brought by three nationally-known golf courses.⁷⁵ Their target in this suit was Tour 18 I, Ltd. (“Tour 18”), who owned and operated two golf courses in Humble, TX and in Flower Mound, TX.⁷⁶ Tour 18’s two courses were designed exclusively of golf holes copied from famous golf courses from across the country.⁷⁷ Tour 18 used topographic maps procured from third parties and video tapes of the golf holes in order to recreate these holes.⁷⁸ “America’s Greatest 18 Holes” was what Tour 18 marketed itself as in regional and national publications.⁷⁹ Signage at each of their holes were placed to indicate to each golfer about to tee off which nationally-known

⁷⁵ See *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 532 (5th Cir. 1998).

⁷⁶ *Id.* at 533.

⁷⁷ *Id.*

⁷⁸ *Id.* at 534-35.

⁷⁹ *Id.* at 535.

golf hole they were about to play.⁸⁰ Tour 18 included the following disclaimer on their scorecards and yardage guide: “The design of this course was inspired by great holes from 16 different golf courses. None of the courses endorse, sponsor, or are affiliated with Tour 18.”⁸¹ They also included disclaimers on the course signage and in some, but not all, advertisement and promotional materials.⁸²

The plaintiffs in this case were Pebble Beach Co., Resorts of Pinehurst, Inc., and Sea Pines Co., Inc.⁸³ All of their courses were and still are part of expensive, destination golf resorts, which draw customers from around the country, including Texas.⁸⁴ Pebble Beach Co. owns and operates five golf courses, including Pebble Beach Golf Links, all of which are located in the Pebble Beach, CA area.⁸⁵ Tour 18 copied the fourteenth hole from their Pebble Beach Golf Links course.⁸⁶ The second plaintiff, Resorts of Pinehurst, Inc., owns and operates seven courses in the Pinehurst, NC area.⁸⁷ Tour 18 copied the third hole from their Pinehurst No. 2 course. The final plaintiff was Sea Pines Co., Inc., who owns and operates Harbor Town Golf Links in Hilton Head, SC.⁸⁸ The defendants copied the eighteenth hole

⁸⁰ *Pebble Beach Co.*, 155 F.3d at 532.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 533.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 533-34.

⁸⁸ *Id.* at 534.

from the Harbor Town course, which included a lighthouse sitting in the water behind the eighteenth green.⁸⁹ None of the three courses held a federal trademark, a registered copyright, or a utility patent on the copied golf holes.⁹⁰

b. The Fifth Circuit's Functionality Issue in Pebble Beach

Trade dress is not protectable if it is functional.⁹¹ The claimed dress is functional if it “is one of a limited number of equally efficient options available to competitors and free competition would be unduly hindered by according the design trademark protection.”⁹² More generally, the question is whether the trade dress is “‘essential to the use or purpose of the article or if it affects the cost or quality of the article,’ that is, if the exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.”⁹³ This limitation is in place in order to assure competition will not be stifled because a limited number of trade dress options have been claimed before new competitors can enter the market.⁹⁴ However, when the trade dress combines several features, it must be asked whether or not the whole combination is functional.⁹⁵

⁸⁹ *Pebble Beach Co.*, 155 F.3d at 532.

⁹⁰ *Id.* at 533-34.

⁹¹ *Id.* at 536.

⁹² *Id.* (quoting *Two Pesos*, 505 U.S. at 775).

⁹³ *Id.* at 538.

⁹⁴ *Id.* at 537.

⁹⁵ *Id.* at 538.

Equipped with these definitions of functionality, the Fifth Circuit dove into applying them to the golf holes at hand. The district court held that these golf-hole designs were non-functional.⁹⁶ This was based mostly on Tour 18's own witnesses. One of their experts testified that protecting the design of these golf holes would not unduly injure competition.⁹⁷ Even Tour 18's marketing director testified that a golf course need not copy golf-hole designs in order to be competitive in their own market.⁹⁸ That's bad witness preparation, good lawyering from opposing counsel, or simply the truth. The district court held that it was the truth and that there are an "unlimited number of alternative designs" for other golf courses.⁹⁹ Tour 18 had failed to show that the plaintiffs' hole designs were in anyway superior to the many available alternatives.¹⁰⁰ The Fifth Circuit affirmed the district court's analysis and held that the design of the golf holes were non-functional.¹⁰¹

3. Conclusion on Functionality

So, what makes a stadium work? What are Wrigley Field's essential elements? A person building a baseball stadium would start with a field to play baseball on and some sort of seating for fans to come watch. Go to

⁹⁶ *Pebble Beach Co.*, 155 F.3d at 536.

⁹⁷ *Id.*

⁹⁸ *Id.* at 532.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 539-40.

your nearest little league or high school baseball stadium. What more is there? If you strip a stadium down to its bare essentials, you have a field and you have some room for spectators. That's it. Adding ivy to the outfield walls, hanging a red marquee sign out front, and having seating on the rooftops on your neighbors' buildings are not essential to a basic stadium. Those things are arbitrary and ornamental. What makes Wrigley Field Wrigley Field is everything that gives it its own character. Those things are not functional, so this doctrine should not preclude it from obtaining trade dress protection, nor should it preclude any owner of a stadium seeking trade dress protection should he add enough character or arbitrary features to his stadium.

D. Does a Stadium Require Secondary Meaning in Order to Garner Protection?

After proving a trademark is of the proper subject matter and not functional, one seeking protection must show that their mark is registerable or protectable.¹⁰² Trademarks are classified into four categories: generic, descriptive, suggestive, and arbitrary or fanciful marks.¹⁰³ A generic term is “the name of a particular genus or class of which an individual article or service is but a member” and a generic term can never receive trademark

¹⁰² See *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790 (5th Cir. 1983).

¹⁰³ *Id.*

protection.¹⁰⁴ If the movie theater discussed earlier named itself, “The Movie Theater,” that would be a generic term because that’s the class of service it’s a part of. To put simply, it’s a movie theater, so it can’t receive trademark protection on the name, “The Movie Theater.” A descriptive term is one that “identifies a characteristic or quality of an article or service” and descriptive terms may only receive trademark protection if the seeker of protection can show that the term has gained secondary meaning in the eyes of consumers.¹⁰⁵ Think of the restaurant Burger King. Their name describes them as a place to get a burger. Trademark protection was not available to Burger King until the owners could show that consumers had formed some secondary meaning with the name. The owners would have to show that, when customers heard the phrase, “Burger King,” they instantly thought of their restaurant before thinking of other burger restaurants. A suggestive term suggests, rather than describes, some particular characteristic of the goods or services to which it applies and requires the consumer to exercise the imagination in order to draw a conclusion as to the nature of the goods or services.¹⁰⁶ One of the local stores here in Columbia, SC is Outspokin’ Bicycles. In order for customers to determine that’s a bicycle shop, there must be some exercising of their imagination, making the name a suggestive term. An arbitrary or fanciful term bears no relationship to the

¹⁰⁴ *Zatarains, Inc.*, 698 F.2d at 790.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 791.

products or services which they are applied to.¹⁰⁷ Apple being the name of a computer company is probably the most popular example of an arbitrary term. Suggestive and arbitrary terms do not require secondary meaning and are normally automatically protectable as trademarks.

Based on the ruling soon to be discussed in *Two Pesos*, Wrigley Field could be deemed inherently distinctive and not require a showing of secondary meaning. However, it's always possible for a court to require secondary meaning. If so, Wrigley Field has likely already acquired it. When one asks a baseball fan where the Cubs play, they'll say Wrigley Field. If one were to ask a baseball fan who plays at Wrigley Field, they'll say the Chicago Cubs. The packaging that is Wrigley Field is already so tied to the product, the Cubs, that any requirement of secondary meaning should already be satisfied.

1. Mexican Food and Kids' Clothes

In *Two Pesos*, the Supreme Court held that product packaging could be inherently distinctive, thus not require secondary meaning.¹⁰⁸ Taco Cabana opened six Mexican restaurants in San Antonio, Texas, starting in 1978.¹⁰⁹ They described their trade dress as "a festive eating atmosphere" with "artifacts, bright colors, paintings and murals."¹¹⁰ The exterior of their

¹⁰⁷ *Zatarains, Inc.*, 698 F.2d at 791.

¹⁰⁸ *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

¹⁰⁹ *Id.* at 765.

¹¹⁰ *Id.*

restaurant had a “festive and vivid color scheme.”¹¹¹ Two Pesos opened in Houston, Texas in 1985 and adopted a motif very similar to Taco Cabana, but it never entered the San Antonio market.¹¹² Taco Cabana sued Two Pesos for trade dress infringement in 1987.¹¹³ The Supreme Court held that there was no persuasive reason to apply to trade dress a general requirement of secondary meaning because it would be at odds with typical trademark infringement suits.¹¹⁴ Therefore, trade dress, in this case product packaging, can be inherently distinct.

Two Pesos dealt with product packaging. Going back to the beginning of this paper, product packaging is defined as the overall look and feel of a product. The Supreme Court separates product packaging from product design.¹¹⁵ Product design is defined as the shape or overall appearance of a product. In *Wal-Mart*, the plaintiff, Samara, designed and manufactured children’s clothing; its primary product being a line of one-piece decorated seersucker outfits.¹¹⁶ Wal-Mart had taken pictures of several of Samara’s 1996 spring/summer line of clothing and sent them to Judy-Philippine, Inc. to reproduce at a cheaper price.¹¹⁷ Judy-Philippine, Inc. copied, with some minor modifications, 16 of Samara’s garments;

¹¹¹ *Two Pesos, Inc.*, 505 U.S. at 765.

¹¹² *Id.* at 763.

¹¹³ *Id.*

¹¹⁴ *Id.* at 770.

¹¹⁵ See *Wal-Mart Stores*, *supra* note 16, at 209.

¹¹⁶ *Id.* at 207.

¹¹⁷ *Id.*

produced their copy of them for Wal-Mart; with which, Wal-Mart took and sold to their customers.¹¹⁸ Wal-Mart generated more than \$1.15 million in gross profits through these knockoff sales.¹¹⁹ The court ruled that product design could not be inherently distinctive, thus requiring secondary meaning.¹²⁰ For trade dress protection in color, secondary meaning is also required.¹²¹

2. The Fifth Circuit in Pebble Beach

In *Pebble Beach*, only Sea Pines received trade dress protection for the eighteenth hole at Harbor Town because it was the only one that had acquired secondary meaning.¹²² The district court held and the Fifth Circuit affirmed that Pebble Beach and Pinehurst were not inherently distinctive because they were merely variations on commonplace themes in the design of golf holes.¹²³ The trade dress of Pebble Beach and Pinehurst's golf holes created nothing more than golf holes.¹²⁴ They required no exercise of one's imagination to realize that one is viewing a golf hole.¹²⁵ Sea Pines, on the other hand, was inherently distinctive.¹²⁶ If you recall from the earlier stated facts of the case, the eighteenth hole at Harbor Town incorporated a

¹¹⁸ See *Wal-Mart Stores*, *supra* note 16, at 207-08.

¹¹⁹ *Id.* at 208.

¹²⁰ *Id.* at 212.

¹²¹ See *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159 (1995).

¹²² *Pebble Beach*, *supra* note 84, at 540.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

lighthouse sitting in the water just past the green. The district court dubbed the lighthouse as an “arbitrary source-identifying feature[].”¹²⁷ Not only had this made the eighteenth green inherently distinctive in the court’s eyes, this hole had acquired secondary meaning in the public’s mind.¹²⁸ The use of the lighthouse took Sea Pine’s eighteenth green out of the generic classification because it emphasized the “individual characteristics” of its particular design, as opposed to a generic golf hole.¹²⁹ Pebble Beach’s and Pinehurst’s holes lacked any individual characteristics; as a result, they were deemed not protectable as generic dress.

The court did provide ways to obtain secondary meaning, if needed. In order to prove secondary meaning, a court will consider the following evidence: (1) length and manner of use of the mark or trade dress, (2) volume of sales, (3) amount and manner of advertising, (4) nature and use of the mark or trade dress in newspapers and magazines (online use likely considered as well, please excuse the archaic and innocent limitation by this 1998 court), (5) consumer survey evidence, (6) direct consumer testimony, and (7) the defendant’s intent in copying trade dress.¹³⁰ No one category of evidence is guaranteed to prove secondary meaning by itself, but the combination of these types of evidence may indicate that consumers

¹²⁷ *Id.* (quoting *Pebble Beach Co. v. Tour 18 I, Ltd.*, 942 F. Supp. 1513, 1558 (S.D. Tex. 1996)).

¹²⁸ *Id.*

¹²⁹ *Pebble Beach*, *supra* note 84, at 541; *see also Zatarains*, 698 F.2d at 790.

¹³⁰ *Id.*

consider the mark or dress to be an indicator of source.¹³¹ Sea Pines proved secondary meaning through its extensive advertising, unsolicited publicity of the trade dress of the hole and the lighthouse in golf publications, and Tour 18's intent to copy and use the trade dress prominently in its advertising.¹³² The Fifth Circuit held that the use of the trade dress of the golf hole and lighthouse in advertising and publicity was done in such a manner as to promote the source, Harbor Town Golf Links, and not just the playing qualities of the hole.¹³³

3. Wrigley Field is Inherently Distinctive

Two Pesos held that product packaging could be inherently distinctive and, if it wasn't, it could acquire secondary meaning to garner protection. *Wal-Mart* held that product design could not be inherently distinctive, which requires those seeking trademark protection for product design to prove secondary meaning. *Two Pesos* dealt with the atmosphere and total feel of a Mexican restaurant, while *Wal-Mart* dealt with the design and pattern used on children's clothing. Which is Wrigley Field more similar too? It's the setting where fans take in a baseball game, so more like the Mexican restaurant in *Two Pesos*. This would mean that Wrigley Field is more like product packaging and can be inherently distinctive as a mark and not require secondary meaning. In arguendo, if a court did require

¹³¹ *Id.*; see also *Zatarains*, 698 F.2d at 795.

¹³² *Id.*

¹³³ *Pebble Beach*, *supra* note 84, at 541-42.

secondary meaning, one could look at the “individual characteristics” of Wrigley and consumer opinions, like the Fifth Circuit did in *Pebble Beach*, to determine whether or not Wrigley has garnered that secondary meaning.

Wrigley Field has been around for 101 years and has features, like the ivy on the outfield walls, which make it instantly recognizable to baseball fans. When you say the words Wrigley Field to a baseball fan or the average sports fan that doesn’t even follow baseball, they likely know the city where Wrigley resides and which team calls it home. Wrigley Field is inherently distinctive. Wrigley Field is one of the most recognizable stadiums in all of sports. Furthermore, a walk-through of the factors suggesting secondary meaning stated by the Fifth Circuit in *Pebble Beach* will show that secondary meaning has been achieved.

The implications for other stadiums are either be around long enough to have instant connection to the team you house or incorporate enough individualized, arbitrary, or ornamental features to create that inherent distinctiveness or secondary meaning. For instance, the analysis for Fenway Park in Boston looks eerily similar to the analysis for Wrigley Field. It’s the only currently used baseball stadium older than Wrigley and has features such as the “Green Monster” that separate it from any other stadiums. Tropicana Field in St. Petersburg, Florida has a little bit harder time, but it might be so ugly on the outside that sports fans may instantly

recognize it. What it does have going for it is that it is one of the few dome baseball stadiums, making it a little easier to be recognized by the average Joe. Getting away from the domes, what about Kauffman Stadium, the home of the 2015 World Series Champions, the Royals? Minus a huge video board in the outfield with a crown on it, there's not much that makes Kauffman Stadium inherently distinct. However, secondary meaning is still likely easy to show. In fact, secondary meaning is very easy for all stadiums to show. Teams and their stadiums are so very tied together that it's near impossible to have one without the other. Stadiums that are shared by two teams, such as the Oakland Coliseum (home of MLB's Oakland Athletics and the NFL's Oakland Raiders) and MetLife Stadium (home of the NFL's New York Giants and New York Jets), might have a harder time showing secondary meaning due to their split-ownership (split-personality, if you will), but it's not outside the realm of possibility. This paper could go through numerous different scenarios with neutral site stadiums or examining how long new stadiums need to be used before they gain secondary meaning, but it shall leave those discussions for future papers. For the issue at hand, Wrigley Field is trade dress by way of product packaging, which can be and likely is already inherently distinct.

E. How Much of a Concern is Use in Commerce for a Stadium?

Trademark law requires some commercial use or transaction of the mark.¹³⁴ The last issue of this paper may not get as much attention, but it's worth briefly exploring because the Sixth Circuit brought it up in its discussion in *Rock & Roll* and it's a fundamental concern of trademark law. According to the statute, a trademark is any word or mark used by a person, "which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter."¹³⁵ This definition of trademark creates an inherent need for one's trademark to be used in a commercial transaction. The ownership of a trademark accrues when goods bearing the mark are placed on the market.¹³⁶ By insisting that firms use marks to obtain rights in them, the law prevents entrepreneurs from reserving brand names in order to make their rivals' marketing more costly.¹³⁷ Public sales let others know that they should not invest resources to develop a mark similar to one already used in the trade.¹³⁸

When a fan or several thousand fans purchase a ticket to Wrigley Field and enter to watch a Cubs game, a commercial transaction has occurred. This is likely enough to end any analysis on this issue. However, the Sixth Circuit did raise one concern worth noting, dubbed by this paper

¹³⁴ See 15 U.S.C. § 1127 (2006).

¹³⁵ 15 U.S.C. § 1127.

¹³⁶ *Blue Bell, Inc. v. Farah Mfg. Co., Inc.*, 508 F.2d 1260, 1265 (5th Cir. 1975).

¹³⁷ *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 503 (7th Cir. 1992).

¹³⁸ *Id.*

as one of “consistency of use.” The Sixth Circuit states that “[c]onsistent and repetitive use of a designation as an indicator of source is the hallmark of trademark.”¹³⁹ The Court held that, even though the Foundation has used drawings and pictures of the Museum in advertisements and on collectibles sold in the gift store, the Foundation had not done so with any consistency.¹⁴⁰ Gentile’s poster used the front of Museum, several items in the store use pictures of the rear of the Museum, and even more items sold by the Foundation use different angles and viewing distances when they do show the front of the Museum.¹⁴¹ Due to this irregular use, the Court held that it found it unlikely that the Foundation would prevail on its claims of trademark infringement against Gentile.¹⁴²

In trying to understand where the Sixth Circuit is coming from, it’s helpful to go back to the issue of whether or not the building is the good or the building is the packaging of the good. It’s clear that the Court saw the Museum as the good. If you accept its view, then certainly you can see how they become concerned with “consistency of use.” When Nike uses the Nike swoosh as a trademark, they must use the swoosh going in the same direction every time. Flipping it upside down or having it “swoosh” the other direction would cause consumer confusion and severely weaken the

¹³⁹ *Rock & Roll*, 134 F.3d at 755.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

policy of wanting to grant Nike this trademark in the first place. However, the Museum is not the good, instead it's the packaging of the good. In his dissent, Chief Justice Marshall goes back to the analogy of the Coke bottle to further his point, which mirrors the point being made by this paper.

The Nike swoosh is a two-dimensional mark. You cannot look at it from many different angles or see it in many different lights. It is what it is. The Coke bottle, on the other hand, is the packaging that the Coke comes in. This trade dress is in three-dimensions. Regardless of the angle from which it is viewed, it is always recognizable as a Coke bottle.¹⁴³ Even when a Coke bottle is photographed and captured in a two-dimensional state, the subject of the picture remains recognizable as the trademarked three-dimensional figure.¹⁴⁴ I.M. Pei designed the Museum to be the Foundation's "Coke bottle."¹⁴⁵ No matter which direction the bottle is looked at in person or through photograph, it will always be recognizable as the packaging that the good is delivered through.

More times than not, the packaging of something is considered in the three-dimensional realm. One must be able to view something in the three-dimensional realm from all angles, with no angle being more important than the others. It simply doesn't make sense that you would only care about the front of a box, for instance. The logo may be on the front, but

¹⁴³ *Rock & Roll*, 134 F.3d at 757 (Martin, J., dissenting).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

the back of the box is necessary to hold the goods inside. If a company wishes to extend their trade dress to the back of the box, it should still be protected. Stadiums are the same way. The entire stadium houses the good. The front of Wrigley Field holds the majority of the stands, but the stadium still surrounds the outfield and fully encompasses the entire field. In what way does looking at Wrigley Field from the rear, from outside the outfield bleachers, change the ability to recognize what you're looking at? The packaging remains the same. Wrigley Field is Wrigley Field from all angles and it is the trade dress. Pictures of Wrigley Field are derivative goods from that trade dress, but that's a discussion for another day.¹⁴⁶

III. CONCLUSION

This paper has walked you through the world of trademark and trade dress and shown their application to stadiums, specifically Wrigley Field. In the beginning, the law was introduced and explained. In Part II, this paper took you through each step needed to establish trade dress protection. First, there must be valid subject matter to extend trade dress protection too and it must be determined what type of subject matter we have. Second, it must be determined that the mark is not functional. Third, one must show either inherent distinctiveness or secondary meaning, depending on what subject

¹⁴⁶ *Rock & Roll*, 134 F.3d at 757 (Martin, J., dissenting).

matter you are presented with. And, finally, the mark must be used in commerce.

In conclusion, stadiums, like Wrigley Field, can get trade dress protection. They are proper subject matter for trade dress protection because stadiums are the product packaging that identifies the good that takes place inside. A stadium, with enough arbitrary or ornamental aspects added to it, can be held to be non-functional. In accordance with *Two Pesos*, stadiums can be inherently distinctive, but if held to a different standard, stadiums should be able to easily establish secondary meaning, which would garner trade dress protection. And, finally, they are used in commerce consistently when fans buy tickets to gain admission into them in order to view the game.

This paper raises so many implications. For instance, to what extent does trade dress extend? The St. Louis Cardinals use the St. Louis Arch in almost all of their promotional items for All-Star Games, they occasionally cut its likeness into the outfield grass, and it's visible during every televised home game. Do the trade dress rights of the Cardinals in Busch Stadium extend to the St. Louis Arch? Second, I chose Wrigley Field, not just because it's one of the most historic and famous parks in America, but because, if the Cubs do have trade dress in the stadium, was the third-party not connected with the Cubs and selling tickets to watch the Cubs from the

neighboring rooftops actually infringing on the Cubs trade dress? Thirdly, there's the issue the Sixth Circuit faced. It shouldn't be a stretch to use this theory to block a team like the White Sox from building their own stadium to look like Wrigley Field. However, what happens when Wrigley Field starts being sold as pictures in posters, or on t-shirts, or in snow globes? Will the ownership rights be violated by third parties selling a poster of Wrigley Field with a sunset in the background? For now, this paper will stop here by simply establishing Wrigley Field, the trademark.