

# Ownable Distinctiveness: What is it and why do you need it?

By Darren S. Cahr and Mary T. Morgan

“Ownable distinctiveness” means capturing and holding a place in the consumer’s heart and mind — a marker that becomes relevantly, meaningfully and uniquely yours. For that place to endure, the successful marketer must not only be able to make a consumer connection, but must also obtain legal protection. The marketplace has become a battleground for share of mind, and unless legal barriers to entry are constructed, your “ownership” may be short lived.

The legal barriers to ownable distinctiveness come in two-forms: functional and nonfunctional.

Functional protection prevents others from copying what your product or service actually does or how it performs. A patent is the most familiar form of functional protection. Why are functional protections important? They can provide a 20-year legal monopoly protecting technical innovation. What are the pitfalls? Functional protections come with an expiration date. Moreover, many innovations, no matter how clever, are subject to obscure legal hurdles that can limit their protection under the patent laws. We will leave our discussion of functional protection to another time. Suffice it to say that, while patents can protect everything from machines to business methods, in today’s brand-driven marketplace something more may be necessary. Something directed not at what your product or service does, but what it means.

For most of us in the brand business, nonfunctional protection is a critical and increasingly utilized vehicle to ownable distinctiveness. Nonfunctional protection prevents others from copying the associations conveyed to the consumer by your product or service. A trademark is the most familiar form of nonfunctional protection. Why are nonfunctional protections important? They are less cumbersome than patents and can be used in a variety of formats. Even more importantly, they can last forever — or as long as you can maintain your connection to the consumer.

It is this endurance factor that motivates the savviest marketers and their lawyers to continue to “push the envelope” of nonfunctional protection — often seeking to protect their brand in several areas, most commonly: (1) words, (2) shapes, (3) images, and (4) sounds. Securing and evolving these protections throughout your brand’s life cycle ensures that you always have ownable distinctiveness.

**Words.** Word protection — encompassing brand names, advertising slogans and product claims — is the most familiar and oft-utilized protection among marketers. Many consumer goods companies have established standardized procedures to review and clear trademarks for new product and extension names, taglines, promotional themes and attribute claims. They know, instinctively, that “McDonald’s” or “Just Do It” are valuable assets and understand the need to seek protection for the words associated with their products or services. However, while words are the most common thing for companies to protect in their quest for ownable distinctiveness, it is only one of many consumer identifiers that can (and should) be protected.

**Shapes.** By shapes, we refer to package configuration, structural presentation and product appearance. These physical manifestations can provide just as strong a brand identification as a product name. For example, Coca-Cola has used a distinctively shaped bottle for decades, and has established a strong public association in connection with that bottle shape. That association has been a powerful weapon for selling Coke, here and around the world. In the words of one court decision: “Doubtless no symbol in the world is so readily recognized [as the Coca-Cola bottle]. This famous form serves two purposes: it allows the consumer to identify immediately what’s inside the bottle; it also serves a utilitarian function by containing the Coca-Cola Company’s primary product — Coca-Cola.”

**Images.** Images are distinct colors, graphic designs and pictorial representations. In the same way that the shape of a product or product packaging can provide consumers with strong brand identification, color and design can direct consumers into thinking of a specific company’s product. A prime example is Owens-Corning and its fiberglass insulation — hardly the “sexiest” product on the market. Owens-Corning has spent millions of dollars promoting its “pink” insulation, even going so far as to associate the Pink Panther cartoon character as a spokesperson for the product. There is no functional reason why the insulation is colored pink. It merely serves as brand identification, to create a hook that permits

consumers to recognize their products. Federal courts have held that Owens-Corning is entitled to prevent others from using the color pink with insulation, because it served to identify to consumers the source or origin of the product — the very essence of their brand.

**Sounds.** Sounds are one of the more subtle ways of establishing a brand association. NBC has used three distinctive chimes (the notes G E C) to reinforce its moniker over the past several years. By doing this, they have associated a sound with their brand. When people hear the chimes, they associate it with NBC. Intel has composed a similar chiming sound, which it includes in all advertising for its own products, and products by other manufacturers which include Intel chips. This form of “subliminal branding” can powerfully reinforce consumer associations, even when the associations are not explicitly stated in the campaign. Even Harley-Davidson has sought to protect the distinctive roar of its engine, believing that the sound of its motorcycles are recognized by consumers, and reinforce Harley’s brand associations with every burst of speed.

Beyond these four principal areas, other forms of nonfunctional protection are being recognized and established right now, including associations in the area of smells and gestures. The United States Supreme Court has stated, quite clearly, that any nonfunctional product feature or advertising element, which acts to identify a product for consumers, can act as a trademark.

No time is better than now to take an inventory of your brand. What are or could be your brand’s point(s) of distinctiveness? Are you capitalizing on them? Are they protected, so they can be as enduring as the Coke bottle, Owens-Corning pink fiberglass and NBC chimes?

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Check out a related article by the same authors entitled “Got Ownable Distinctiveness?” which appeared in the September/October 2001 edition of *BrandPackaging* magazine.