

# 5 Unusual Things You Should Trademark

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Filing a trademark shouldn't stop at words and logos. There are many other ways to protect your brand that you may be overlooking.

Grand chocolatier Nestle recently won a trademark battle with rival confectioner Cadbury. The case was about the unique shape of Nestle's famed Kit Kat bar. The case began years ago when Nestle sought to register the four-fingered shape of the Kit Kat bar as a trademark in the European Union (EU). In 2002, the Office of Harmonization for the International Market (OHIM), which registers EU Community Trademarks, allowed Nestle's trademark to register.

A few years later Cadbury disputed Nestle's trademark arguing that it lacked the requisite distinctiveness to maintain protection as a trademark. The EU cancellation committee agreed with Cadbury and declared Nestle's trademark for the shape of the Kit Kat bar invalid.

Nestle appealed the decision and in a recent ruling the OHIM Board of Appeals reinstated the trademark on the grounds that the shape of Nestle's Kit Kat bar had acquired distinctiveness over the years. Because consumers now recognize the shape Nestle is entitled to protection of the product's shape as a trademark.

So what does this mean for you and your business? Trademarks are not limited to words and logos alone. There are other categories of trademarks that can help you protect your business's intellectual property rights. Here are a few non-mainstream categories that can truly help you to protect your business's brand identity:

## 1. Product Packaging Shapes

Did you know that you can actually receive trademark protection for the packaging of your product? The best example on the market is the iconic hour glass shape of the small Coca Cola bottles. It is so well-recognized that Coca Cola recently decided to use the same shape on all of their two liter bottles. For generations Coke has used the same design to the extent that consumers now recognize the design of the bottle alone and, correspondingly, the product therein. The best example I can think of in recent years is that of the POM Wonderful bottle which resembles, in large part, a turn-of-the-century barbell standing on one end. So if you have unique product packaging that distinguishes your product in the eyes of consumers protect it.

## 2. Product Packaging Designs

But it is not just the shapes of unique packaging that can be protected. Color schemes and designs on the packaging can also be protected. For instance, our friends at Coke can also protect their iconic red theme with the white wave line through it that appears on their products. So if you have a unique color scheme or otherwise in the design of your packaging you may protect that as well.

## 3. Restaurant Themes and Color Schemes

You can even protect the theme and interior color scheme of a restaurant. Let's say you own a burger franchise whose restaurants always have red and white checkerboard tile walls, natural wood furnishings, and red countertops ala Five Guys. That unique color and decor scheme can be protected as a trademark provided that you can establish that your consumers recognize they are in your restaurant merely by recognizing the color scheme and design thereof.

#### **4. Sounds**

The rumble of a Harley Davidson motorcycle. The five note Intel jingle. The ding of the Southwest fares deal. These are all sounds that have been, or have been attempted to be, protected as trademarks. Continuing with a consistent theme, so long as a purported trademark holder can establish that when consumers hear their unique audible sound they associate it with that company's goods or services you may also protect the same as a trademark.

#### **5. Colors**

What can Brown do for you? Have you heard that question asked in UPS commercials over the past few years. Well, if you have, it is probably because of a larger branding strategy employed by the shipping giant to trademark the color brown in connection with shipping and commercial carrier services. Yes colors too can be trademarked. A few years back UPS applied to register the color with the U.S. Patent and Trademark Office claiming that they were entitled to register the color insofar as consumers had come to recognize the color brown as uniquely identifying UPS's shipping services.

If memory serves me correctly, their application was rejected for a lack of proof of acquired distinctiveness (i.e., that when consumers saw the color brown on trucks they would associate it with UPS). Thereafter the multimillion dollar ad campaign was launched directly associating the color brown with UPS's shipping services. What can brown do for you? I will leave that for UPS to answer. What did the ad campaign do for them? It most likely secured their trademark for the color brown.

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