

A TRADE DRESS APPROACH TO THE PROTECTION OF RADIO BRANDS

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I. INTRODUCTION

In 1985, one of the world's leading producers of radio identification jingles,¹ JAM Creative Productions, released "The JAM Song"² as a celebration of the countless radio stations and syndicated programs for which the company had prepared jingles.³ At the beginning of the song, JAM founder and lyricist Jonathan Wolfert writes that radio is "such a maze of W's and K's . . . [a]nd every city's got a 'Kiss.'"⁴ Today, over ten years later, Mr. Wolfert's observations not only remain true, but have become even more pronounced.

There are now nearly sixty radio stations operating under the "KISS" banner,⁵ and while listeners must still navigate through the "maze of W's and K's," their options are even more complex as satellite radio, Internet audio services, and high definition digital terrestrial radio have dramatically expanded the range of programming competing for their attention. Further, as the media marketplace has become more competitive, programming has become more fragmented. New programming formats are targeting much narrower segments of the listening audience than ever before, giving rise to an array of innovative and highly distinctive formats. In some cases, the reliance on such creative

¹ A station identification jingle is a "short little song[] that tell[s] you the name of the radio station you're listening to." JAM Creative Productions, Inc., Radio ID Jingles, <http://www.jingles.com/jam/radioids/index.html> (last visited Nov. 12, 2006).

² See JAM Creative Productions, Inc., The JAM Song, <http://www.jingles.com/jam/collector/jamsong.html> (last visited Nov. 12, 2006).

³ *Id.*

⁴ JAM Creative Productions, Inc., The JAM Song Lyrics, <http://www.jingles.com/jam/gfx/jamsongback.gif> (last visited Nov. 12, 2006). "W" and "K" refer to radio station call letters that begin with the letter "K" for stations west of the Mississippi River and a "W" for stations east of the Mississippi River. See 47 C.F.R. § 73.3550 (2005).

⁵ A station search on the website of Clear Channel Communications, the company that owns the KISS brand, reveals that there are fifty-nine stations branded as KISS. See Clear Channel Communications, Clear Channel Radio Station Search, <http://www.clearchannel.com/Radio/StationSearch.aspx?RadioSearch=KISS> (last visited Nov. 12, 2006).

programming methods is so central to a company's business model⁶ that protection of the format against "copycats" becomes of paramount importance.⁷

But what, exactly, is a "format," and how might a broadcaster or radio consulting firm—the two entities most likely to create such formats—go about protecting a format from imitators? This article endeavors to articulate a working definition for a "radio format" and, using trade dress law, proposes one way in which format owners might assert rights in their programming concepts in order to maximize return on their creative investments.

A. *Formats Defined*

Although a precise definition of a radio format is somewhat elusive, one programmer describes a format as "[a]ll of the structural elements . . . work[ing] together harmoniously—artistically—to create in listeners the desired concept of what the station represents, particularly when there's competition in the format."⁸

To most radio listeners, a "format" can be defined simply by the type or style of music that a particular radio station plays. Indeed, most conventional radio formats have few distinguishing features besides a specific musical style;

⁶ For example, the innovative Jack FM radio format has become "radio's fastest-growing brand," and is now licensed on nearly forty radio stations throughout the United States and Canada. See SparkNet Communications, L.P., JACK-FM "Playing What We Want," <http://www.jack.fm> (last visited Nov. 12, 2006).

⁷ See, e.g., First Amended Complaint for Injunctive Relief and Damages ¶¶ 13-18, SparkNet Commc'ns, L.P. v. Bonneville Int'l Corp., No. 05C-2677 (N.D. Ill. June 8, 2005).

⁸ ERIC G. NORBERG, RADIO PROGRAMMING: TACTICS AND STRATEGY 18 (1996).

station names⁹ tend to correlate with the music type and are typically fairly general.¹⁰ As musical styles and tastes change over time, so do radio formats, and much as music has become more fragmented over the years, radio formats have likewise become more specific.¹¹ For example, where “Top 40”—or, as it is known in the industry, Contemporary Hit Radio (“CHR”)—was once a viable format in its own right, today such stations have split into more targeted offerings. For example, CHR/Rhythmic stations feature a mix of conventional pop music along with the addition of certain urban and dance titles, while CHR/Pop stations tend to play the same pop music tracks, but with more of a rock or alternative music skew.¹² Similar fragmentation can be seen in other musical styles, such as what is generally considered “adult contemporary” (“AC”) music. Like CHR, AC was once considered a format in and of itself. But in the mid-1990s, fragmentation began to take hold, giving rise to a host of new splinter formats, including Hot AC, Bright AC, Soft AC, and so forth, each

⁹ Note that a station’s name, as used here, is the brand by which a particular station is popularly known to members of the community. *See, e.g.,* PROMOTION AND MARKETING FOR BROADCASTING AND CABLE 35 (Susan Tyler Eastman et al. eds., 3d ed. 1999). Such brands can be contrasted with call letters, which are assigned by the Federal Communications Commission (“FCC”) to every licensed radio station and serve as formal, legal identification of the station. *See* Federal Communications Commission, Station Identification and Call Signs, <http://www.fcc.gov/cgb/statid.html> (last visited Nov. 12, 2006). While some stations have chosen to use their call letters as their brand (e.g., KYGO/Denver), or variants thereof (e.g., JYY/Concord, NH is legally known as WJYY), many other stations have created entirely separate brand identities that have little connection to their call letters (e.g., KQKS/Denver branded as KS-107.5, orWSTR/Atlanta branded as Star 94). *See* Radio-Locator, <http://www.radio-locator.com> (last visited Nov. 12, 2006), where information pertaining to each radio station, including each station’s website, can be obtained by entering the station’s call letters into the website’s search engine.

¹⁰ Take, for example, B-104 (WAEB/Allentown, PA), Z-100 (WHTZ/New York), Q-100 (WWWQ/Atlanta), Mix 100 (KIMN/Denver), Power 99 (WUSL/Philadelphia), and Smooth Jazz 104.3 (KJCD/Denver). *See* Radio-Locator, <http://www.radio-locator.com> (last visited Nov. 12, 2006).

¹¹ NORBERG, *supra* note 8, at 19.

¹² *See* TvRadioWorld, CHR (Contemporary Hit Radio) Formats, http://radiostationworld.com/directory/Radio_Formats/radio_formats_CHR.asp (last visited Nov. 12, 2006).

featuring roughly similar musical styles but differing in how the music is presented and delivered.¹³ Despite this fragmentation, the resultant formats have remained rather bland and standardized; they can be defined almost entirely by the type of music that is played. Aside from the station's unique call letters, there is little basis upon which to distinguish one radio station from another.

Despite the trend of relative homogenization of programming styles, a few programmers have attempted to create uniquely distinctive radio formats to target more narrowly defined segments of the station's target audience. One such attempt came in early 2003, when Infinity Broadcasting's WNEW-FM in New York transitioned from FM Talk, which had a male-targeted format, to a "new female-targeted format . . . called '102.7 Blink.'"¹⁴ "Blink" was rather unique because it was designed to "combine contemporary music . . . with entertainment, celebrity news and gossip, fashion and pop culture."¹⁵ In addition to the unique blend of music and talk programming, the station's "on-air personalities [were not] confined to strict playlists,"¹⁶ a hallmark feature of most adult contemporary formats.¹⁷ As *Mediaweek* reporter Katy Bachman observed: "[t]he new format approach allows WNEW to extend other Viacom brands to radio such as *Entertainment Tonight*, VH1 and MTV."¹⁸ Blink can therefore be characterized as an attempt by Viacom to optimize its return on investment in creative properties by leveraging those assets across multiple platforms.

Several months after the format launched in New York, it was substantially modified, moving away from "entertainment-intensive/broad music format" to a purely music-based format that emphasizes "music women

¹³ See generally JOANNA R. LYNCH & GREG GILLISPIE, PROCESS AND PRACTICE OF RADIO PROGRAMMING 22, 27 (1998) (explaining the evolution of adult contemporary radio formats).

¹⁴ Katy Bachman, *Infinity Reveals Details of "102.7 Blink,"* MEDIAWEEK.COM, Apr. 10, 2003, http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=1862180 (last visited Nov. 12, 2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ LYNCH & GILLISPIE, *supra* note 13, at 22.

¹⁸ Bachman, *supra* note 14.

love.”¹⁹ The format folded completely in December 2004, less than a year after it first launched, as Blink 102.7 became Mix 102.7, featuring a fairly straightforward adult contemporary music-based presentation.²⁰

Despite the ultimate failure of Blink, which took months of research and planning and substantial resources to create,²¹ there are indications that, had the format proved successful, Infinity Broadcasting had plans to syndicate the format, potentially launching it on other Infinity—owned radio stations.²² Indeed, *Detroit Free Press* reporter John Smyntek believed the format might find a home on a flagging Detroit radio station, noting that “[i]f [Blink] catches on, there’ll be a race to convert a lagging Infinity property . . . to it.”²³

Although Infinity’s Blink format ended unsuccessfully, other programmers have successfully created and developed innovative new formats. For instance, a former radio professional started an Internet-based radio station in 2000, featuring random music selection and a deep and diverse music library.²⁴

¹⁹ Marc Schiffman, *Format Change in a Blink*, BILLBOARD, Sept. 27, 2003, at 69.

²⁰ Katy Bachman, *WNEW-FM’s Format Gone in a Blink, Replaced by Mix Formula*, MEDIAWEEK, Jan. 5, 2004, at 8.

²¹ Bachman, *supra* note 14.

²² Viacom filed applications for federal trademark registration on the word “Blink” in both International Class 38 for “radio broadcasting, and internet broadcasting services,” and Class 41, for

entertainment services, namely radio programming services, radio entertainment production, syndication of radio programs, and providing radio programs in the fields of music, news, sports, current events; entertainment services, namely, conducting contests via radio; providing information in the fields of music and music-related content, news, sports, current events, and entertainment via a global computer network and conducting contests via a global computer network.

See U.S. Trademark Registration Nos. 78,225,305 and 78,225,603. The latter suggests that Viacom perhaps had plans to offer Blink-related programming services to stations beyond WNEW.

²³ John Smyntek, *Infinity Says Its New Idea Is a One-Stop-Shopping Format*, DETROIT FREE PRESS, Apr. 14, 2003, at 2E.

²⁴ Joel Stein, *You Don’t Know Jack*, TIME, Aug. 15, 2005, at 62.

Dubbed "Jack," the format was so unique and pioneering that a Vancouver FM radio station licensed the format and brand in 2002.²⁵ Today, there are nearly forty radio stations licensed to use the Jack format throughout the United States and Canada, and the United States licensor of the format, SparkNet Communications, L.P., recently struck a deal with ABC Radio Networks to license the format in small United States markets.²⁶

As described by one of the format's co-creators, "Jack stations are built on unique principles that go far beyond the music and weave through every aspect of the radio station."²⁷ Jack's presentation is described as "innovative and even progressive" and "clearly distinguished from other stations."²⁸ At its heart is a "total package that has eluded mainstream pop stations in combining hit music from different styles into a compelling programming package. It's like an adult listener's I-Pod [sic] of hit music from many genres on 'shuffle.'"²⁹ The format's "personality" is described as "pro-listener," but not "anti-radio," and "mildly contemptuous of transparently formatted radio"; "Jack is honest . . . Jack won't take requests, and pokes fun at the very thought by airing 'The No-Request Nooner' in some markets."³⁰ A court recently reviewing the Jack concept in a trademark infringement case identified nine key characteristics of the format:

- (a) no use of radio personalities; (b) no disc jockeys, but rather pre-recorded announcements over and over; (c) no research for the purpose of customizing the format to local markets; (d) no weather information; (e) no traffic information; (f) no news; (g) no announcements of special events in the local area; (h) no

²⁵ *Id.*

²⁶ SparkNet Communications, L.P., JACK-FM, "Playing What We Want," <http://www.jack.fm> (last visited Nov. 12, 2006); *see also* U.S. Trademark Registration No. 3,009,396 (protecting the word mark "JACK FM" for "radio broadcasting services; internet broadcasting services; audio streaming over the Internet; video streaming over the Internet").

²⁷ Mike Henry, *Jack Clones and Wannabes Beware!*, RADIO & RECORDS, Apr. 8, 2005, available at <http://www.paragonmediastrategies.com/articles/59.pdf>.

²⁸ Larry Johnson, *Jack FM Sweeping the Nation*, PARAGON MEDIA STRATEGIES 1, 2 (2005), <http://www.paragonmediastrategies.com/articles/60.pdf>.

²⁹ *Id.*

³⁰ *Id.*

discussions or on-air commentary; and (i) the same name—i.e., “Jack FM”—across all stations.³¹

This brief description makes clear that Jack’s format is more than a mere music-based style of programming; rather, it is a complete brand designed to attract listeners of a specific demographic and psychographic profile, and to attract advertisers desiring to reach those specific listeners. But like most successful enterprises, Jack has seen its fair share of attempts at imitation, mostly by other stations that have similarly adopted a human name and play what appears to be an endless and random mix of music.³² Indeed, the general format concept has become so popular that it has given rise to a generic descriptor: “variety hits.”³³ But as the format’s originators have said, “[s]imply giving a station a human name does not create a unique market position.”³⁴ Thus, despite attempts by imposter stations to create the classic Jack sound by simply widening the diversity of music played, the format’s originators believe that “broadening musically will lead [competitors] down the wrong road . . . [b]roadening the playlist of mainstream formats *too much* will undermine the familiarity and ultimately the *cume* and the core of these stations.”³⁵

Although most attempts at creating Jack knockoffs have been designed to leverage the popularity of the variety hits format without paying royalties for use of the Jack brand, on numerous occasions SparkNet Communications, L.P. has sent cease and desist demand letters to radio stations using slogans that, in

³¹ SparkNet Commc’ns, L.P. v. Bonneville Int’l Corp., 386 F. Supp. 2d 965, 975-76 (N.D. Ill. 2005).

³² For example: WWRZ/Lakeland, Florida branded as Max FM; WMKK/Boston branded as Mike FM; and KNLT/Walla Walla, Washington branded as Bob FM. See Radio-Locator, <http://www.radio-locator.com> (last visited Nov. 12, 2006); New Northwest Broadcasters, LLC, 95.7 Bob FM Station Profile, <http://www.nnbradio.com/stations/tri/KNLT.html> (last visited Nov. 12, 2006).

³³ Lou Pickney, Variety Hits, Jack-FM Stations, <http://www.varietyhits.com/variety/brands/jack.shtml> (last visited Nov. 12, 2006).

³⁴ Henry, *supra* note 27.

³⁵ *Id.* “Cume” is one metric by which radio audiences are measured. Arbitron, the leading provider of radio ratings services, defines “cume” as “[t]he total number of *different* persons who tune to a radio station during the course of a daypart for at least five minutes.” Arbitron Inc., Terms for the Trade, http://www.arbitron.com/downloads/terms_brochure.pdf.

its view, were confusingly similar to the Jack slogan,³⁶ “Playing What We Want,” for which SparkNet holds a federal trademark registration.³⁷ In one instance, SparkNet took the issue to court, accusing Bonneville Broadcasting of trademark infringement for using three different slogans on a handful of its stations: “70’s, 80’s . . . Whatever We Want,” “Today’s New Music . . . and Whatever We Want,” and “70’s, 80’s . . . Whatever We Feel Like.”³⁸

Although the court ultimately found for the defendant, holding that SparkNet “failed to prove that consumers are likely to be confused about the identity or source of the radio stations in the marketplace,”³⁹ the rapid rise in the popularity of the Jack format not only demonstrates that such formats are filling a need in the radio marketplace, but also that such formats can be viewed as licensable properties. The rapid rise in the number of attempts at mimicking the Jack format demonstrates the need to articulate appropriate methods of protecting such formats as valuable intellectual assets.

B. *Current Protection Mechanisms*

Current intellectual property regimes, namely copyright and trademark law, offer the most fertile ground for architects of radio formats to protect their creations. Copyright law is perhaps the most obvious form of protection available to broadcasters, since, in general terms, it covers original works of authorship that are fixed in a tangible medium of expression.⁴⁰ The radio broadcast of a particular station, then, provided it is fixed in some sort of tangible medium—e.g., recorded as the broadcast transmission is made—would be protected under federal copyright law. Additionally, the individual programming elements that make up a particular format—such as the jingles,⁴¹

³⁶ Memorandum of Bonneville Int’l Corp. in Opposition of Bohn & Assocs. Media, Inc. Motion to Stay and Motion to Dismiss, Declaration of Anthony P. Alden, Ex. G, SparkNet Commc’ns, L.P. v. Bonneville Int’l Corp., No. 05C-2677 (N.D. Ill. Nov. 16, 2005).

³⁷ U.S. Trademark Registration No. 2,884,478.

³⁸ SparkNet Commc’ns, L.P. v. Bonneville Int’l Corp., 386 F. Supp. 2d 965, 968 (N.D. Ill. 2005).

³⁹ *Id.* at 979.

⁴⁰ See 17 U.S.C. § 101 (2000).

⁴¹ See *supra* note 1 and accompanying text.

imaging elements,⁴² and any written materials used in preparing the format⁴³ or the on-air presentation thereof⁴⁴—may also be copyrightable.⁴⁵ Any printed promotional materials used by the station are also likely to be copyrightable works, including brochures, contest collateral material, television advertisements, out-of-home advertising content (e.g., billboards, bus-bench advertising), and similar materials.⁴⁶

Trademark law also offers some opportunity for radio stations to protect their formats. Radio station call letters,⁴⁷ if used as the brand by which audience members recognize a particular radio station, are protectable as trademarks and can be federally registered.⁴⁸ Similarly, radio station brand names can be protected as trademarks,⁴⁹ as can the slogans and positioning statements, as demonstrated by the *SparkNet* case discussed above. Broadcasters have successfully protected their brands through the use of sound marks, such as the

⁴² Imaging elements consist of various pre-recorded materials that are used throughout the implementation of a particular radio format or program, often featuring professional voiceover actors and actresses saying the name of the station and promoting various aspects of its programming, poking fun at competitors, and generally promoting the station in such a way that its name and brand image will maintain a top-of-mind position within the mind of the station's audience.

⁴³ Many radio stations prepare operations manuals, for example, that set forth the basic principles of a radio station's operation. See generally NORBERG, *supra* note 8, at 21.

⁴⁴ Traditional radio air personalities relied on index cards with short informational "blurbs" that were to be read throughout the station's programming, usually designed to promote upcoming station events, community activities, and to promote various features of the station and its programming. Today, even though advances in technology have replaced the cards with computer monitors, the underlying concept remains the same.

⁴⁵ See 17 U.S.C. § 102(1) (extending copyright protection to literary works).

⁴⁶ See 17 U.S.C. § 102(5) (extending copyright protection to pictorial, graphical, and sculptural works).

⁴⁷ See *supra* note 9 and accompanying text.

⁴⁸ See *In re WSM, Inc.*, 1985 TTAB LEXIS 118, *10, 225 U.S.P.Q. (BNA) 883, 884 (T.T.A.B. 1985).

⁴⁹ See *In re Cumulus Broad., Inc.*, 2004 TTAB LEXIS 608, *9 (T.T.A.B. 2004).

widely-known NBC chimes⁵⁰ and other musical signatures, like the six note melody used by ESPN to identify its programming.⁵¹ In addition, Clear Channel subsidiary Citicasters owns a federal registration on a distinctive pronunciation and delivery of the phrase "KISS-FM,"⁵² and Fisher Broadcasting successfully registered a sound mark to identify its stations.⁵³

Finally, although there is yet little judicial support, certain aspects of a radio format might be protectable under trade secret law, which generally protects certain information that is of commercial value and not publicly known

⁵⁰ U.S. Trademark Registration No. 916,522 ("The mark comprises a sequence of chime-like musical notes which are in the key of C and sound the notes G, E, C, the 'G' being the one just below middle C, the 'E' the one just above middle C, and the 'C' being middle C, thereby to identify applicant's broadcasting service.").

⁵¹ U.S. Trademark Registration No. 2,450,525 ("The mark consists of the following six musical notes played in a fast tempo: 'D, C sharp, D, D, C sharp, D.'").

⁵² U.S. Trademark Registration No. 2,733,629 ("The mark consists of 'KIIS FM' (pronounced 'kiss ef em') spoken with a distinctive delivery in a distinctive male announcer's voice in a low tenor register with the emphasis of delivery on the second portion of the words (i.e., the 'ef em' [phonetic] portion), and with a very brief, less than one-half of a second, pause between the 'kiss' (phonetic) and 'ef em' (phonetic) portions.").

⁵³ U.S. Trademark Registration No. 2,672,479 ("The mark consists of distinctive synthesized musical sound which may be described as follows; This musical mark is written in the key of A major and 4/4 time. It is two measures/or bars long, consisting of quarter notes, half notes, dotted half notes and whole notes in a four-part melody, [sic] The notes played on the first beat of the first bar consist of the quarter note A on the treble clef or G clef, A on the base clef just below middle C, and A one octave below the A on the base clef. The notes played on the second beat of the first bar consist of the dotted half note E and the base note B, which are sustained for 3 beats in the first bar and 4 beats in the second bar. The third note consists of A, two octaves below middle C which is sustained for a total of 6 beats, played on the third beat of the first bar, with increasing volume (crescendo) until the beginning of the second bar and decreasing volume (diminuendo) eventually ending at the double bar, followed by the sound of a flag waving and snapping in the wind.").

or available.⁵⁴ The primary weakness of using such a theory is that aspects relating to a radio station's programming are necessarily disclosed to the public by virtue of the radio station's broadcast—which is, by its very nature, a public disclosure. But certain aspects of the programming strategy may not be readily determined by just listening to the radio station. Many formatting principles, such as music rotation patterns,⁵⁵ artist and gender balance,⁵⁶ tempo restrictions,⁵⁷ and other playlist construction considerations, would be difficult to discern without listening to the radio station on a continuous or nearly continuous basis. Such programming rules, to the extent they remain confidential and to the extent that they form the basis of a particular radio format, might constitute enforceable trade secrets.

C. *Articulating a Definition for the Modern Media Marketplace and the Need for a Clearly Defined Mechanism of Protection*

Current intellectual property protection mechanisms, as reviewed *supra* in Part I.B, reveal that broadcasters must take a piecemeal approach to the

⁵⁴ Although trade secret law is generally state law, thus making the precise definition vary from state-to-state, a trade secret is typically something that is maintained as a secret, with some degree of commercial value. See, e.g., David G. Majdali, *Trade Secrets Versus the Internet: Can Trade Secret Protection Survive the Internet Age?*, 22 WHITTIER L. REV. 125, 130 (2000).

⁵⁵ A rotation pattern is a generic term that refers to the way a radio station selects music from its library to construct song-by-song playlists. Such patterns are comprised of rules that control the "sound" of the station by scheduling certain songs at certain times, juxtaposed with certain other songs or programming elements. See, e.g., NORBERG, *supra* note 8, at 72-74.

⁵⁶ Artist and gender balance refer to two types of commonly used rules that a radio station might employ in constructing its playlists. The former restricts certain artists being played next to other artists, usually to ensure diversity (e.g., a station might limit a Phil Collins song from playing within five songs of a Genesis song; although the artists are, in a literal sense, different, the sound of the music is typically quite similar, since Phil Collins serves as the lead singer of Genesis). The latter prevents too many songs from male or female artists being played back-to-back, or from an hour of music becoming too "female heavy" or too "male heavy."

⁵⁷ Tempo restrictions allow a programmer to set the pace and tone of his or her station by ensuring that each block of music maintains a certain average tempo.

protection of radio formats, using copyright, trademark, and trade secret principles to guard various aspects of their programming against imitators. While such an approach may offer a sufficient shield against the misappropriation of individual elements, it fails to recognize the economic value that lies in the unique configuration of those elements into a distinctive “sound,” which is ultimately designed to target listeners of a specific demographic and psychographic profile.

Thus, this article proposes the following working definition of a “format”: *a unique composition of individually protectable and unprotectable programming elements that, when properly configured, are indicative of the source of a particular radio station’s programming.*

The need for an effective method of protecting such programming formats is becoming increasingly important, as the packaging and distribution of audio content across multiple platforms becomes more widespread. For instance, the rapid increase in the number of radio-like media options that are available to listeners has led to an increased degree of market fragmentation, which is resulting in a slew of narrowly defined formats targeting very specific segments of the population.⁵⁸ While just a few years ago there were substantial barriers to entering the radio broadcasting field (due to capital costs and government licensing and regulation), today, virtually anyone with a computer and an Internet connection can establish what essentially amounts to a radio station.⁵⁹ Commercial media have responded with the development of new technologies, such as digital radio and satellite radio. Digital radio allows radio stations to transmit multiple signals over existing bandwidth, creating what

⁵⁸ See Cheryl L. Evans & J. Steven Smethers, *Streaming into the Future: A Delphi Study of Broadcasters’ Attitudes Toward Cyber Radio Stations*, 8 J. RADIO STUD. 12 (2001) (predicting increased audience fragmentation as a result of the “Cyber radio revolution”).

⁵⁹ See, e.g., Live365, Inc., Create and Broadcast Your Own Radio Station, <http://www.live365.com/broadcast/index.live> (last visited Nov. 12, 2006) (“Thousands of people just like you have created Internet radio stations! With Live365, you’re the DJ. Start a station to share your tastes and talents with a global audience.”).

operates effectively as separate radio stations.⁶⁰ Satellite radio creates a nationwide radio system through the use of direct broadcast satellite transmissions, and requires listeners to have special satellite radio receivers. There are currently two providers of satellite radio services, each offering nearly 100 distinct channels of programming.⁶¹

Technological innovation has led to an increased need for programming, and for the development of programming that is geared towards more narrowly defined target audiences than ever before. This requires substantial investment, which, in turn, requires a mechanism of protection to ensure that developers of new programming formats can obtain an economically viable return on their investments.

Economic innovation within the traditional radio broadcasting industry has also reaffirmed the need to protect radio formats. Clear Channel Communications, the largest owner of radio stations in the United States, has arguably been at the forefront of such economic innovation, by developing networks of similarly-formatted radio stations and swapping programming elements between them.⁶² Clear Channel operates nearly sixty radio stations under its "KISS-FM" brand name,⁶³ with most KISS stations featuring similar

⁶⁰ iBiquity Digital Corporation, What is HD Radio Broadcasting?, http://www.ibiquity.com/hd_radio (last visited Nov. 12, 2006) (listing the various benefits of high definition radio, including the opportunity for more advanced data and audio services, such as surround sound; multiple audio sources at the same dial position; on-demand audio services; store-and-replay [so you can store a radio program that airs when you are at work and replay it on your commute home]; overlaying real-time traffic information on a navigational map to help you find the shortest route; a "buy" button for music, sports, and concert tickets; along with a host of other services).

⁶¹ See XM Satellite Radio, Learn About XM, <http://www.xmradio.com/learn> (last visited Nov. 12, 2006) (noting that XM Radio "features over 170 digital channels"); see also SIRIUS Satellite Radio, FAQs, <http://www.sirius.com/faqs> (last visited Nov. 12, 2006) (noting that Sirius Satellite Radio "is a service offering over 125 channels of satellite radio").

⁶² Anna Wilde Mathews, *From a Distance: A Giant Radio Chain Is Perfecting the Art of Seeming Local—DJs for Clear Channel Use High-Tech Gear to Sound Like They're Next Door*, WALL ST. J., Feb. 25, 2002, at A1.

⁶³ See *supra* note 5.

logos, on-air imaging, and in some cases, even the same on-air personalities.⁶⁴ Programming for KISS stations often sounds highly standardized, with a KISS station in one market sounding remarkably similar to KISS stations in other markets.⁶⁵ Indeed, it appears that Clear Channel has adopted a functional structure mimicking that of many retail chains and franchise systems, by operating a group of radio stations in geographically diverse markets pursuant to a set of guidelines designed to ensure some degree of consistency throughout the brand.

This article argues that, just as a retail chain or franchisor can protect its “system,” proprietors of radio formats, through careful application of existing legal principles, may likewise be able to protect their formats. By using this article’s definition of a “format,”⁶⁶ it becomes possible to envision the radio format as a separate asset, potentially worthy of protection in its own right.

There are, of course, no specific legal regimes for the protection or registration of radio formats, and creating a brand new form of protection just for a single industry would be inefficient. As this article discusses below, however, if one considers a format as a source-significant identifying feature of a radio station, it becomes possible to think of a particular station’s format as its

⁶⁴ Mathews, *supra* note 62, at A1. A process known as “voice tracking” allows air personalities in one market to prepare complete radio shows for stations in distant markets, often so seamlessly that listeners of the remote station are completely unaware that the air personality is not live and local in the remote station’s market. Critics argue that filling a station’s programming with content that does not originate in the local market is deceptive to listeners and prevents stations from adequately serving their local communities. *FCC Broadcast Localism Hearing Before the FCC Localism Task Force* (2004) (statement of John Connolly, President, American Federation of Television and Radio Artists), http://www.fcc.gov/localism/072104_docs/connolly_statement.pdf. Proponents of such programming strategies and techniques respond that the economics of local radio broadcasting are such that it is infeasible to fully staff a radio station on a continuous basis. Marko Ala-Fossi, *Worth More Dead than Live: US Corporate Radio and the Political Economy of Cyber-Jocking*, http://www.nordicom.gu.se/common/publ_pdf/157_315-332.pdf.

⁶⁵ Mathews, *supra* note 62, at A1.

⁶⁶ See *supra* Part I.A.

“packaging.” As such, an application of trade dress law could become a potentially effective method of protecting the format from unfair competition.

II. TRADE DRESS BASICS

A. *Core Concepts and Definitions*

In simple terms, trade dress refers to the “total look of a product and its packaging and even includes the design and shape of the product itself.”⁶⁷ The concept of trade dress emanates from the language of the Lanham Act of 1946, which provides for the protection of trademarks, defined to include “any word, name, symbol, or device, or any combination thereof” that is used in such a way so as to identify the source of a particular product or service.⁶⁸ Most scholars and courts agree that by using the words “symbol” and “device,” Congress has signaled its intention to make the list as broad as possible, allowing protection to virtually anything that may be indicative of source.⁶⁹ Courts, for example, have upheld the availability of trade dress protection for the motif of a restaurant;⁷⁰ the display and presentation of products in a retail establishment;⁷¹ and the general look and feel of a line of greeting cards, even though the individual elements comprising the trade dress may have been individually unprotectable.⁷²

Trade dress analysis is divided into two categories: product packaging and product design.⁷³ Product packaging generally refers to “the box, container or other packaging which contains the product being sold, but is not part of that

⁶⁷ 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8.4 (4th ed. 2005).

⁶⁸ 15 U.S.C. § 1127 (2000).

⁶⁹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162, 34 U.S.P.Q.2d (BNA) 1161, 1162 (1995).

⁷⁰ *See, e.g., Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 U.S.P.Q.2d (BNA) 1081 (1992).

⁷¹ *See, e.g., Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60 (S.D.N.Y. 2003).

⁷² *See, e.g., Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32, 35 U.S.P.Q.2d (BNA) 1284, 1287 (2d Cir. 1995).

⁷³ *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209, 54 U.S.P.Q.2d (BNA) 1065, 1067 (2000).

product. It is the part that is discarded when one uses the product.”⁷⁴ A particular product’s packaging should not be confused with labels and other identifying materials that may be affixed to such packaging, which is not protectable trade dress.⁷⁵ Product packaging trade dress protection extends only “to the extent that the packaging serves a source identifying role, separate and apart from any labels or printed word marks or logos.”⁷⁶ In contrast, product design refers to the “shape, look, or design which is itself so unique that it serves to identify the source of the product.”⁷⁷

In a seminal trade dress case, *Wal-Mart Stores, Inc. v. Samara Bros.*,⁷⁸ Justice Scalia, in discussing the holding of *Two Pesos, Inc. v. Taco Cabana, Inc.*,⁷⁹ suggested that there is, perhaps, a third category of trade dress—a *tertium quid*—“that is akin to product packaging.”⁸⁰ Specifically, he noted that the interior decor of a restaurant, held to be protectable trade dress under *Two Pesos*, was to be considered either product packaging or the undefined third category which, essentially, is like packaging, yet sufficiently different to warrant separate categorization.⁸¹ Since the *Wal-Mart* case, courts have been forced to consider the packaging-design-*tertium quid* taxonomy on numerous occasions.⁸²

Hearing echoes of *Two Pesos*, a federal district court was asked to determine whether trade dress protection should be afforded to the “appearance and content” of menus at two competing Mexican restaurants in *Vasquez v. Ybarra*.⁸³ The court in *Vasquez* determined that the menus warranted protection

⁷⁴ Lars Smith, *Trade Distinctiveness: Solving Scalia’s Tertium Quid Trade Dress Conundrum*, 2005 MICH. ST. L. REV. 243, 254 (2005) (citation omitted).

⁷⁵ *Id.* at 254-55.

⁷⁶ *Id.* at 255.

⁷⁷ *Id.* at 256.

⁷⁸ 529 U.S. at 205, 54 U.S.P.Q.2d (BNA) at 1065-66.

⁷⁹ 505 U.S. 763, 23 U.S.P.Q.2d (BNA) 1081 (1992).

⁸⁰ *Wal-Mart*, 529 U.S. at 215, 54 U.S.P.Q.2d (BNA) at 1069.

⁸¹ *Id.*

⁸² Smith, *supra* note 74, at 273.

⁸³ *Id.* at 273-4 (citing *Vasquez v. Ybarra*, 150 F. Supp. 2d 1157, 1158-59 (D. Kan. 2001)).

as trade dress, falling into the *tertium quid* category.⁸⁴ The Court of Appeals for the First Circuit, on the other hand, recently rejected a *tertium quid* argument, holding that a “combination of elements comprising . . . candle sizes and shapes, quantities sold, labels, Vertical Design System, and catalog” was more like product design and configuration, as opposed to product packaging or the undefined *tertium quid*.⁸⁵

B. *The Abercrombie Spectrum and the Role of Distinctiveness*

The proper classification of trade dress as product design, product packaging, or a *tertium quid* is critical in determining the scope of protection afforded to a particular trade dress claim. Just as with conventional trademarks, trade dress is subject to the spectrum of distinctiveness set forth in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, which organizes trademarks into four categories: generic, descriptive, suggestive, and arbitrary or fanciful.⁸⁶ According to the *Abercrombie* court, a “generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species” and, as such, is not entitled to trademark protection.⁸⁷ Marks that fall into the “descriptive” category simply describe some aspect of the product or service to which they are affixed, and are entitled to trademark protection only if they become indicative of the source of such product or service.⁸⁸ Suggestive marks are similar to descriptive marks in that they describe some aspect of the product or service to which they are affixed, but typically such description is indirect, and requires some “imagination, thought and perception to reach a conclusion as to the nature of goods” or services.⁸⁹ Finally, arbitrary or fanciful marks have no connection with the goods or services to which they are affixed.⁹⁰ Arbitrary marks are common words that are used in a context unrelated to the

⁸⁴ *Id.* at 274 (citing *Vasquez* at 1158-59).

⁸⁵ *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 40, 59 U.S.P.Q.2d (BNA) 1720, 1728 (1st Cir. 2001).

⁸⁶ 537 F.2d 4, 9, 189 U.S.P.Q. (BNA) 759, 764 (2d Cir. 1976).

⁸⁷ *Id.*

⁸⁸ *See id.* at 10, 189 U.S.P.Q. (BNA) at 765.

⁸⁹ *Id.* at 11, 189 U.S.P.Q. (BNA) at 765 (quoting *Stix Prods., Inc. v. United Merchs. & Mfrs., Inc.*, 295 F. Supp. 479, 488, 160 U.S.P.Q. (BNA) 777, 785 (S.D.N.Y. 1968)).

⁹⁰ *See id.* at 11 n.12, 189 U.S.P.Q. (BNA) at 766 n.12.

primary meaning of the words, whereas fanciful marks are “words invented solely for their use as trademarks.”⁹¹ The latter two categories of marks, “suggestive” and “arbitrary and fanciful,” are considered to be inherently distinctive “because their intrinsic nature serves to identify a particular source of a product.”⁹² Inherently distinctive marks do not require any showing of secondary meaning or acquired distinctiveness in order to be protected as trademarks.⁹³

In *Wal-Mart*, the Court noted that product design is not inherently distinctive, and thus must acquire secondary meaning in order to warrant trade dress protection.⁹⁴ The Court explained that “[t]he attribution of inherent distinctiveness to certain categories of word marks and product packaging derives from the fact that the very purpose of attaching a particular word to a product, or encasing it in a distinctive packaging, is most often to identify the source of the product.”⁹⁵

Under *Wal-Mart*, product packaging is inherently distinctive (provided it is nonfunctional and in some way source-significant) and requires no showing of secondary meaning or acquired distinctiveness to constitute protectable trade dress, while product design requires such a showing before trade dress protection may become available.⁹⁶ The Court cautioned against over-application of trade dress protection, noting that “[t]o the extent there are close cases, we believe that courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning.”⁹⁷

⁹¹ *Id.*

⁹² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 23 U.S.P.Q.2d (BNA) 1081, 1083 (1992).

⁹³ *Id.* at 769, 23 U.S.P.Q.2d (BNA) at 1083-84.

⁹⁴ *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212, 54 U.S.P.Q.2d (BNA) 1065, 1068 (2000).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 215, 54 U.S.P.Q.2d (BNA) at 1070.

C. *Functionality*

Trade dress is only protectable to the extent that it is not functional: “[a]n element of a product container or wrapper may be functional because it contributes to efficiency or economy in manufacturing or handling, or to durability.”⁹⁸ Similarly, if an element of a product container or wrapper is commonplace, it is not entitled to trade dress protection.⁹⁹ With respect to products, courts have looked to various sources for evidence that a particular design aspect is actually functional and not merely source-significant, including whether a patent has been secured on the utilitarian aspect of the design;¹⁰⁰ whether advertising for the product touts any utilitarian aspect of the design;¹⁰¹ and facts about the design and manufacturing, such as whether the design was chosen because it makes manufacturing easier or cheaper.¹⁰²

There are six popularly used “tests” for determining functionality of a particular trade dress,¹⁰³ two of which appear to be the most common: the comparable alternatives test, and the effective competition test.¹⁰⁴ The comparable alternatives test “asks whether trade-dress protection of certain features would nevertheless leave a variety of comparable alternative features that competitors may use to compete in the market. If such alternatives do not exist, the feature is functional; but if such alternatives do exist, then the feature is

⁹⁸ MCCARTHY, *supra* note 67, § 8.20.

⁹⁹ *Id.*

¹⁰⁰ *See* TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 58 U.S.P.Q.2d (BNA) 1001 (2001).

¹⁰¹ *See* Int’l Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 823, 28 U.S.P.Q.2d (BNA) 1287, 1290 (9th Cir. 1993) (citing *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1121, 227 U.S.P.Q. (BNA) 417, 420 (Fed. Cir. 1985)).

¹⁰² *See id.* at 823-24, 28 U.S.P.Q.2d (BNA) at 1290.

¹⁰³ Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress Protection*, 83 CORNELL L. REV. 1116, 1144 (1998) (describing the six tests: “(1) ‘comparable alternatives,’ (2) ‘essentiality to usage,’ (3) ‘relation to usage,’ (4) ‘ease of manufacture,’ (5) ‘effective competition,’ and (6) ‘de facto/de jure functionality’”).

¹⁰⁴ *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.* (*Abercrombie II*), 280 F.3d 619, 642, 61 U.S.P.Q.2d (BNA) 1769, 1784 (6th Cir. 2002).

not functional.”¹⁰⁵ The effective competition test is similarly concerned with the claimed trade dress’s impact on the competitive landscape. That test:

asks, in amorphous terms, whether trade-dress protection for a product’s feature would hinder the ability of another manufacturer to compete effectively in the market for the product. If such hindrance is probable, then the feature is functional and unsuitable for protection. If the feature is not likely an impediment to market competition, then the feature is nonfunctional and may receive trademark protection.¹⁰⁶

III. APPLICATION OF TRADE DRESS LAW TO RADIO FORMATS

A. *Threshold Considerations*

1. **Packaging Versus Design: The Role of a Radio Station and its Format**

To the average listener, a radio station provides a source of entertainment, news, information, and, to a degree, companionship.¹⁰⁷ But the economics of broadcasting demonstrate that the relationship between a radio station and its listeners is more complex, since a radio station typically generates its revenue by selling airtime to advertisers, usually in small units or batches of small units¹⁰⁸ customarily known to listeners as commercials. In essence, then, advertisers pay the radio station for brief periods of access to its listeners. Without any listeners, there would be few, if any, advertisers willing to pay a radio station for access to its airwaves.

¹⁰⁵ Wong, *supra* note 103, at 1144-45 (citations omitted).

¹⁰⁶ *Id.* at 1149 (citations omitted).

¹⁰⁷ NORBERG, *supra* note 8, at 1-6.

¹⁰⁸ It is fairly typical to buy airtime in increments of 60, 30, and in some increasingly rare cases, 15 and 10 second lengths, individually referred to as “spots.” It is rare, however, for a station to sell airtime on a one-off basis; stations generally require a commitment to a certain number of spots per day over a certain period of time.

A typical commercial radio station,¹⁰⁹ therefore, must essentially service two distinct yet interrelated markets: it must offer programming of sufficient interest to a particularly defined segment of the radio-listening audience, such that advertisers are willing to purchase airtime to communicate with those listeners. Thus, to the extent that a radio station can be said to offer a “product,” that product is best characterized as a specially-targeted audience—the listeners of the station—and not the programming of the station. The programming merely functions as a mechanism by which listeners with certain demographic and psychographic profiles are targeted.

After considering the competitive landscape and its market position, a radio station will select a format based on its desire to attract a particular, narrowly-defined audience. Thus, a station’s format is best described as the station’s “packaging” or something akin to packaging—a *tertium quid*—which, if sufficiently distinctive, is entitled to trade dress protection.

2. Functionality

A radio station’s format is not “functional” under either test of functionality discussed *supra* in Part II.C. If a radio station’s format is viewed as a mechanism by which the station attracts a certain audience, there could still be, for any one set of audience characteristics, countless other formats and related programming strategies and techniques that could attract the very same audience. That is, even though a particular format may be crafted with the intent to attract a specific audience, it does not follow that the particular format is the *only* way to attract that audience. Indeed, for any particular demographic group, there are likely an infinite number of programming options that would attract them. In addition, the rapidly changing and increasingly competitive nature of

¹⁰⁹ To some degree, a similar dynamic is evident in noncommercial broadcasting as well, to the extent that such stations rely on revenue from underwriting announcements, which, like advertising messages on commercial radio stations, are typically designed to convey a message to a particular audience.

the radio industry is forcing broadcasters to become more creative with their programming, and to find new ways of attracting certain audience segments.¹¹⁰

Thus, in the parlance of the “comparable alternatives test,” a radio format is nonfunctional because allowing trade dress protection of a sufficiently distinctive format “would nevertheless leave a variety of comparable alternative features that competitors may use to compete in the market.”¹¹¹ Because other comparable alternatives exist that achieve the same end—that is, other formats are available to attract the same target audience—the format is nonfunctional.

Applying the “effective competition test” yields similar results: protecting a station’s sufficiently distinctive format would not hinder the ability of other radio stations in the market from competing. Because the station seeking to protect its format would not be protecting the individual and often commonly-used programming techniques or elements, but rather, the overall “sound” of the station, it is unlikely that another station would have difficulty

¹¹⁰ On March 22, 2006, two new radio stations launched in the Denver market, both featuring innovative formats designed to target audiences that were already targeted by other stations in the market. The first station, branded as “101.5 Martini on the Rockies” features a lifestyle format with a music blend of contemporary artists like Norah Jones, Sarah McLachlan, and Sheryl Crow, mixed with original offerings from Linda Eder, Diana Krall, and Michael Buble.” The other station, dubbed “Sassy 107,” targets “active adult women by offering a bright presentation with a musical blend from artists like Carole King, Carly Simon, Carpenters, James Taylor, America, and Chicago.” *Denver Radio Company Debuts Two New Stations*, ALL ACCESS NET NEWS, Mar. 22, 2006, <http://www.allaccess.com> (follow “Net News” hyperlink) (last visited Nov. 12, 2006). Denver Radio Company (“DRC”) Market Manager, Steve Keeny, commented that both formats are “original in both content and music and fit perfectly into the discerning Denver lifestyle.” *Id.* Further, DRC Director of Operations & Programming Entertainment, Tim Maranville, noted that the stations featured “two very unique formats created exclusively for Denver [that] are designed to satisfy an unfilled audience need.” *Id.* Both formats attract audiences that were previously targeted by other Denver-based radio stations, however, such as KOSI (Cozy 101), KALC (Alice 105.9), KIMN (Mix 100), and KJCD (Smooth Jazz 104.3).

¹¹¹ *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.* (*Abercrombie II*), 280 F.3d 619, 642, 61 U.S.P.Q.2d (BNA) 1769, 1784 (6th Cir. 2002).

competing for the same audience if one station's format—its mechanism of attracting an audience—were protected.

3. Formats as Mere "Advertising Themes"

Perhaps the greatest challenge to the notion that radio formats are protectable trade dress comes from the widely accepted view that mere advertising or marketing "themes" are not protectable. For example, in *Haagen-Dazs, Inc. v. Frusen Gladje Ltd.*, an ice cream manufacturer's trade dress was characterized as a "unique Scandinavian marketing theme."¹¹² The court rejected the assertion that such a theme constituted protectable trade dress, reasoning that such protection

would work a grave injustice not only upon the defendants . . . but also upon late entrants into a given product market. For example, when consumers became increasingly aware of the ingredients in food products, producers rushed to extol the virtues of their "all natural" products. It would be ludicrous, however, to suggest that in our free enterprise system, one producer and not another is permitted to take advantage of the "all natural" marketing approach to enhance consumer reception of its product.¹¹³

In essence, the court believed that extending protection to general marketing and advertising themes is too general, thereby hindering competition by unreasonably preventing competitors from marketing their goods and services.¹¹⁴

Later cases have also raised the policy concerns of protecting overly-general marketing themes, as opposed to specifically defined trade dress. In *Landscape Forms, Inc. v. Columbia Cascade Co.*, a manufacturer of outdoor furniture was denied trade dress protection for the design of its products.¹¹⁵ In holding that its alleged trade dress was actually an "unprotectable style, theme or

¹¹² 493 F. Supp. 73, 75, 210 U.S.P.Q. (BNA) 204, 206 (S.D.N.Y. 1980).

¹¹³ *Id.*

¹¹⁴ Readers who, at this juncture, are experiencing difficulty in seeing a radio format as anything more than a mere advertising theme may wish to jump to Part III.C.3, *infra*, for a discussion of individual elements that, when taken together, would constitute a protectable format under the present analysis.

¹¹⁵ 113 F.3d 373, 375, 42 U.S.P.Q.2d (BNA) 1641, 1642 (2d Cir. 1997).

idea,”¹¹⁶ the court explained that, while the appropriate inquiry in a trade dress case is the “‘overall look’ of a product,”¹¹⁷ a party asserting trade dress protection may not “dispense with an articulation of the specific elements which comprise its distinct dress.”¹¹⁸ Absent such a “precise expression of the character and scope of the claimed trade dress . . . courts will be unable to evaluate how unique and unexpected the design elements are in the relevant market,” and “will also be unable to shape narrowly-tailored relief if they do not know what distinctive combination of ingredients deserves protection.”¹¹⁹ Thus, “a plaintiff’s inability to explain to a court exactly which aspects of its [trade dress] merit[s] protection may indicate that its claim is pitched at an improper level of generality, i.e., the claimant seeks protection for an unprotectable style, theme or idea.”¹²⁰ A trade dress owner must therefore claim not only a total look and feel of its product or service, but also the specific elements that make up the claimed dress, or else risk a finding that the dress is actually just a general marketing style.

Even in cases where the elements that make up a particular dress are sufficiently articulated, protection may still be denied, as in *Miracle Blade, LLC v. Ebrands Commerce Group, LLC*.¹²¹ There, a distributor of knife sets that marketed its wares primarily by way of television infomercials claimed that several elements comprised its total trade dress, including: “the infomercial, the telephone operator script, and the creative features of the handle design for the knives, the selection of the particular individual knives, and their composition into an arbitrary set.”¹²² The court denied protection of the elements because it was a mere “combination and refinement of commonly used elements of other prior direct-marketed knife sets.”¹²³ Specifically, many of the elements of the *Miracle Blade* infomercial were “actually recycled from prior knife infomercials” and “similar combinations of the knives . . . have been offered in the past by

¹¹⁶ *Id.* at 381, 42 U.S.P.Q.2d (BNA) at 1647.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 207 F. Supp. 2d 1136, 63 U.S.P.Q.2d (BNA) 1265 (D. Nev. 2002).

¹²² *Id.* at 1152, 63 U.S.P.Q.2d (BNA) at 1275 (internal quotation marks omitted).

¹²³ *Id.* at 1153, 63 U.S.P.Q.2d (BNA) at 1276.

others.”¹²⁴ The court ultimately held that the purported “trade dress is simply not a unique one” and that Miracle Blade “has failed to demonstrate how its trade dress is unique from other direct-marketers of knives and how it serves to identify the products to a specific source.”¹²⁵

Similarly, in *Sports Traveler, Inc. v. Advance Magazine Publishers, Inc.*, Sports Traveler claimed trade dress protection in the appearance of its female-oriented sports magazine, which consisted of

(1) the trademark “Sports Traveler”; (2) the word “sports” boldly placed across the masthead in lower case helvetica [sic] (neue heavy extended) typeface and the word “traveler” in smaller, upper case Caslon 540 font typeface underneath the word “sports”; (3) the logo display with the word “sports” emphasized over the word “traveler” in contrasting colors; (4) the layout of the typeface of the word “sports,” which has been arranged so that the letters in the word “sports” slightly touch or blend into one another; and (5) a feminine, sports-oriented model depicted in an active setting.¹²⁶

The court held that the claimed dress was generic, because the typefaces used to present the title of the magazine were relatively commonplace and available to anyone.¹²⁷ It also held that the use configuration of the various title elements was generic when compared with other magazines.¹²⁸ Of particular interest to the present discussion, however, is the court’s position that:

Sports Traveler’s argument fails because it relies on the uniqueness of the idea of a women’s sports magazine and not

¹²⁴ *Id.*

¹²⁵ *Id.* After finding that Miracle Blade had failed to demonstrate its trade dress was inherently distinctive, the court proceeded to analyze whether the trade dress had acquired secondary meaning. The court ultimately held that it had not acquired such secondary meaning, and was thus not entitled to protection. *Id.* at 1153-54, 63 U.S.P.Q.2d (BNA) at 1276-77.

¹²⁶ 25 F. Supp. 2d 154, 162 (S.D.N.Y. 1998).

¹²⁷ *Id.* (“The fonts used for the words ‘sports’ and ‘traveler’ are not unique because the fonts used are available ‘off the shelf.’”).

¹²⁸ *Id.* at 163.

the uniqueness of the trade dress of a specific embodiment of that idea. Uniqueness of an idea and not the trade dress itself is not a proper basis upon which a court can base a finding that a trade dress is capable of being a source identifier. The connection must be between the trade dress and the product, not the idea and the product.¹²⁹

Thus, although a particular idea or concept may be highly unique and innovative, it will receive no protection from trade dress law unless the idea or concept is characterized by properly articulated, sufficiently distinctive, and source-identifying elements that comprise the idea or concept's trade dress.

B. *Lessons from Retailers*

When one considers a radio station's "product" as access to listeners of a particular demographic and psychographic group, and the format as merely the mechanism by which the station attracts such an audience, it becomes easier to apply trade dress theories to a radio programming context. Because a radio station's format is essentially its audio motif—or in other words, the sonic equivalent of the "look and feel" of a retail establishment—a review of select cases involving retail trade dress is instructive.

1. *Abercrombie & Fitch v. American Eagle Outfitters*

As discussed *supra* in Part II.A, the Supreme Court held in *Two Pesos* that the interior look and feel of a Mexican restaurant was protectable trade dress,¹³⁰ and noted in a later case, *Wal-Mart*, that such interior motif was a form of product packaging.¹³¹ In *Wal-Mart*, the Court also noted that if such a form of trade dress was not packaging, it was something "that is akin to product packaging."¹³²

¹²⁹ *Id.* (citing *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32-33, 35 U.S.P.Q.2d (BNA) 1284, 1287-88 (2d Cir. 1995)).

¹³⁰ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776, 23 U.S.P.Q.2d (BNA) 1081, 1086 (1992).

¹³¹ *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215, 54 U.S.P.Q.2d (BNA) 1065, 1069 (2000).

¹³² *Id.*

The Sixth Circuit Court of Appeals was then called upon to apply these principles in *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.* (“*Abercrombie II*”), where apparel retailer Abercrombie & Fitch brought suit against American Eagle Outfitters for infringement of its trade dress.¹³³ Abercrombie claimed that its trade dress was comprised of nine components:

- (1) Use of the Abercrombie marks, in particular the A & F trademark in Universe Bold Condensed typeface.
- (2) Use of the word *performance* on labels and advertising and promotional material to convey the image of an active line of casual clothing.
- (3) Use of such words and phrases as *authentic*, *genuine brand*, *trademark*, and *since 1892* on labels and advertising and promotional material to convey the reliability of the Abercrombie brand.
- (4) Use of the word *outdoor* on labels and advertising and promotional materials to convey the image of a rugged outdoor line of casual clothing.
- (5) Use of design logos, such as the ski patrol cross and lacrosse sticks, and product names for the types of clothing, such as “field jersey,” to convey the image of an athletic line of casual clothing.
- (6) Use of primary color combinations, such as red, blue, grey, tan, and green in connection with solid, plaid, and stripe designs, to create a consistent design and color palette.
- (7) Use of all natural cotton, wool, and twill fabrics to create a consistent texture palette.
- (8) The creation of a cutting edge “cool” image through photographs and advertising and promotional material, such as the A & F Quarterly (the “catalog” or “Quarterly”). The Quarterly presents the Abercrombie brand and trade dress in a unique manner: namely, it features the Abercrombie brand and trade dress in a “cut-out” or “clothesline” style and uses color bars to illustrate the available colors of the item, while combining a consistent conceptual theme with a lifestyle editorial content of music, electronics, books, and magazine features. The catalog is printed on cougar vellum paper, which is unique for a catalog.
- (9) The creation of a consistent merchandise look in A & F stores through the use of in-store signage and display setups and through the use of the

¹³³ 280 F.3d 619, 624, 61 U.S.P.Q.2d (BNA) 1769, 1770 (6th Cir. 2002).

“Abercrombie sales associate team,” which is comprised primarily of college students.¹³⁴

The court parsed the various elements into three broader categories of potential trade dress that the company sought to protect: “1) the designs of the goods themselves, 2) the design of the catalog created to sell its products by, among other things, cultivating an image it wants consumers to associate with its products, and 3) features of its in-store presentation associated with the sale of its products.”¹³⁵

In regard to the first category, “the designs of the goods themselves,”¹³⁶ the court explained that product design or configuration, “unlike its packaging[,] is inextricably tied to the product itself, such that even the most unusual features of a product’s design cannot automatically identify which producer crafted the product because consumers are not predisposed to treat design features as an indication of source.”¹³⁷ It recognized that “[a]fter [Wal-Mart], no product configuration can meet the distinctiveness requirement of the Lanham Act by a showing of inherent distinctiveness but must rely instead on acquired distinctiveness.”¹³⁸ The court then considered American Eagle Outfitters’ “limited admission of intentional copying [to] constitute[] evidence that Abercrombie’s [trade] dress has acquired strong secondary meaning”¹³⁹ and accordingly, found the clothing designs to be sufficiently distinctive so as to warrant trade dress protection.¹⁴⁰

But in conducting its functionality review, the Sixth Circuit looked to the individual elements that Abercrombie claimed to make up its product design trade dress, including phrases such as “authentic” and “genuine brand,” along

¹³⁴ *Id.* at 625, 61 U.S.P.Q.2d (BNA) at 1771.

¹³⁵ *Id.* at 633, 61 U.S.P.Q.2d (BNA) at 1777.

¹³⁶ *Id.*

¹³⁷ *Id.* at 637, 61 U.S.P.Q.2d (BNA) at 1780.

¹³⁸ *Id.* at 637, 61 U.S.P.Q.2d (BNA) at 1780-81.

¹³⁹ *Id.* at 639, 61 U.S.P.Q.2d (BNA) at 1782. American Eagle Outfitters “had admitted intentional copying for purposes of [a preliminary] motion.” *Id.* at 626, 61 U.S.P.Q.2d (BNA) at 1772.

¹⁴⁰ *See id.* at 639-40, 61 U.S.P.Q.2d (BNA) at 1782.

with the fabric, color, and design palettes.¹⁴¹ In finding Abercrombie's clothing design trade dress to be legally functional, the court explained that "[w]ere the law to grant Abercrombie protection of these features, the paucity of comparable alternative features that competitors could use to compete in the market for casual clothing would leave competitors at a significant non-reputational competitive disadvantage and would, therefore, prevent effective competition in the market."¹⁴² The court reached a similar conclusion with respect to Abercrombie's third claimed aspect to its trade dress—the "features of its in-store presentation associated with the sale of its products"¹⁴³—noting that, despite their distinctiveness, the functional nature of those features precluded trade dress protection.¹⁴⁴

The court was more forgiving when it considered Abercrombie's second claim to protection, namely, "the design of the catalog created to sell its products by, among other things, cultivating an image it wants consumers to associate with its products."¹⁴⁵ Abercrombie's catalog was comprised of numerous elements, including: "a 'cutout' or 'clothesline' style and . . . color bars to illustrate the available colors of goods, while combining a consistent conceptual theme with a lifestyle editorial content of music, electronics, books, and magazine features and is printed on cougar vellum paper which is unique for a catalog."¹⁴⁶ Further, the lifestyle content was presented in a way that included "grainy images of exceptionally fit and attractive young people in outdoor (often collegiate) settings, alone and in groups, wearing more or less [Abercrombie] clothing in ways that convey their allegiance to the brand while also seemingly

¹⁴¹ See *id.* at 642-43, 61 U.S.P.Q.2d (BNA) at 1784-85.

¹⁴² *Id.* at 643-44, 61 U.S.P.Q.2d (BNA) at 1785.

¹⁴³ *Id.* at 633, 61 U.S.P.Q.2d (BNA) at 1777.

¹⁴⁴ See *id.* at 644, 61 U.S.P.Q.2d (BNA) at 1785. Specifically, with respect to Abercrombie's use of college students as the primary source of its in-store workforce, the court explained that "[f]orbidden clothiers to use college students to sell garments to or for college-age people indubitably prevents them from effectively competing in the market for casual clothing directed at young people." *Id.*

¹⁴⁵ *Id.* at 633, 61 U.S.P.Q.2d (BNA) at 1777.

¹⁴⁶ *Id.* at 644 n.22, 61 U.S.P.Q.2d (BNA) at 1785 n.22. The court later describes the "clothesline" style: "the garments appear on the page as if hanging from a clothesline, *i.e.*, not on a model." *Id.* at 644-45, 61 U.S.P.Q.2d (BNA) at 1786.

attempting to create a sexual mystique about the wearer."¹⁴⁷ The court observed that, although the catalog itself had "certain functions, including 'the creation of a cutting edge "cool" Abercrombie image,' and, presumably, selling clothes," such functionality "does not make the catalog's overall design functional."¹⁴⁸ Although each element, when considered individually, may have served some functional purpose, Abercrombie's "arrangement of these features can constitute more than the sum of its non-protectable parts."¹⁴⁹

In considering functionality, the Sixth Circuit effectively applied the comparable alternatives test, explaining that, although Abercrombie "has chosen to print its catalog on an unusual kind of paper," competitors are free to choose from "a variety of other paper options."¹⁵⁰ Similarly, the court noted that, although "[c]olorbars [sic] are a useful mechanism for communicating the available selection of colors, . . . the same information can be provided in a handful of other ways."¹⁵¹ Finally, in considering the editorial content that Abercrombie claimed set its catalog apart from its competitors, the Sixth Circuit observed that "clothing retailers have an infinite variety of options for surrounding their clothes with pleasing or desirable imagery that avoids showing scantily clad college students in a grainy photograph,"¹⁵² and that "mail order retailers can still sell their clothes and create an aura about their products without including such content, although this method seems to have recently become a particularly effective way of creating demand."¹⁵³ The court ultimately decided that, on the record before it, there were sufficient issues of material fact to warrant a jury determination as to whether protecting the catalog's trade dress "leaves open sufficient comparable alternate methods of marketing clothing to young people by mail, such that granting [Abercrombie] a monopoly on its distinctive configuration would not hinder the ability of another manufacturer to compete effectively in the market."¹⁵⁴ But because Abercrombie had failed to

¹⁴⁷ *Id.* at 645, 61 U.S.P.Q.2d (BNA) at 1786.

¹⁴⁸ *Id.* at 644, 61 U.S.P.Q.2d (BNA) at 1785.

¹⁴⁹ *Id.* at 644, 61 U.S.P.Q.2d (BNA) at 1786.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 645, 61 U.S.P.Q.2d (BNA) at 1786.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

show a likelihood of success on its ultimate claim of trade dress infringement, the Sixth Circuit affirmed the trial court's granting of summary judgment in favor of American Eagle Outfitters.¹⁵⁵

2. *Best Cellars v. Wine Made Simple*

Another retail trade dress case that is valuable in considering the application of trade dress concepts to radio formats was recently decided in the Southern District of New York. In *Best Cellars, Inc. v. Wine Made Simple, Inc.*, Best Cellars, a small chain of wine shops, sued Wine Made Simple, owners of a small franchise system of wine stores called Bacchus, alleging infringement of its retail trade dress.¹⁵⁶ Best Cellars had launched its first store in New York City in 1996, and was the brainchild of a wine connoisseur interested in designing "a totally new kind of retail store for wine intended to simplify the wine shopping experience for the novice wine consumer."¹⁵⁷ Best Cellars' unique store design and method of selling wine has achieved substantial media attention.¹⁵⁸

The store's central concept is to organize wines by taste category, and its interior decor includes: "wine racks built into a wall, which consist of tubes to hold bottles of wine horizontally, creating the appearance of a grid of steel rimmed holes in a light wood-paneled wall. The graphic design elements include computer-generated icons and brightly colored signs associated with each taste category."¹⁵⁹ Best Cellars specifically claimed trade dress protection in:

the total effect of the interior design of its store, which it describes as: (1) eight words differentiating taste categories; (2) eight colors differentiating taste categories; (3) eight computer manipulated images differentiating taste categories; (4) taste categories set above display fixtures by order of weight; (5) single display bottles set on stainless-steel wire pedestals; (6) square 4"x4" cards with verbal descriptions of each wine ("shelf talkers") with text arranged by template; (7) shelf talkers

¹⁵⁵ *Id.* at 647-48, 61 U.S.P.Q.2d (BNA) at 1788-89.

¹⁵⁶ 320 F. Supp. 2d 60, 66-67 (S.D.N.Y. 2003).

¹⁵⁷ *Id.* at 65 (internal quotation marks omitted). At the time of suit, Best Cellars operated four additional stores and licensed its system to one store. *Id.* at 66.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

positioned at eye level, below each display bottle; (8) bottles vertically aligned in rows of nine; (9) storage cabinets located beneath vertically aligned bottled [sic]; (10) materials palette consisting of light wood and stainless steel; (11) mixture of vertical racks and open shelving display fixtures; (12) no fixed aisles; (13) bottles down and back-lit; and (14) limited selection (approximately 100) of relatively inexpensive wine.¹⁶⁰

The district court began its distinctiveness discussion by citing the *Wal-Mart* decision, noting that “the interior decor category fits awkwardly into the classifications of trade dress law, constituting either product packaging or a ‘*tertium quid*’ akin to product packaging,”¹⁶¹ and that “[i]nterior decor is . . . clearly *not* product design.”¹⁶² It emphasized the importance of considering trade dress as a combination of elements (rather than individual elements) when determining whether a claimed trade dress is distinctive¹⁶³—in part because “it is the combination that a customer would perceive upon entering the store.”¹⁶⁴ The court was careful to explain that certain individual aspects of Best Cellars’ trade dress may not be individually protectable, much as the Sixth Circuit noted in

¹⁶⁰ *Id.* at 70.

¹⁶¹ *Id.* (citing *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215, 54 U.S.P.Q.2d (BNA) 1065, 1069 (2000)).

¹⁶² *Id.*

¹⁶³ *Id.* at 71. The court explained:

While it is important that the party claiming protection articulate with specificity the elements comprising its trade dress for purposes of the distinctiveness inquiry, as Best Cellars has done here, it would be analytically unsound to parse each individual element to determine where it falls on the *Abercrombie* spectrum. Rather, although each element of a trade dress individually might not be inherently distinctive, it is the combination of elements that should be the focus of the distinctiveness inquiry. Thus, if the overall dress is arbitrary, fanciful, or suggestive, it is distinctive despite its incorporation of generic [or functional] elements.

Id. (citations and internal quotation marks omitted).

¹⁶⁴ *Id.* at 72.

Abercrombie II when considering the various elements of Abercrombie & Fitch's trade dress.¹⁶⁵ Specifically, the court observed that:

[S]ome elements of Best Cellars' trade dress are related to the marketing theme of selling wine by taste, [but] those elements are not dispositive. While categorization of wine by taste is relevant to [Best Cellars'] trade dress to the extent it impacts the store's interior design, that element standing alone is not protected, and [Best Cellars] cannot prevent other sellers from categorizing wine by taste either in their general marketing scheme or in their interior design.¹⁶⁶

The court found Best Cellars' trade dress to be inherently distinctive, thereby warranting trade dress protection.¹⁶⁷ In reaching this conclusion, however, the court gave functionality only a fleeting mention, explaining that

[w]hile certain articulated elements are well-designed and thus "functional" for the purpose of retail wine sales, such as posting point-of-sale cards at a height where they can be easily read by the average height shopper, or storing wines in a cabinet positioned so low on a wall that using that space for display would be impractical, that does not mean that those elements are to be excluded from a specifically articulated trade dress. By the same logic, simply because certain elements are used in other wine shops, such as storing wine horizontally in racks or presenting one display bottle per wine does not mean that those

¹⁶⁵ *Id.* at 72-73. The district court also pointed out an interesting paradox that often appears in trade dress infringement cases: In order to successfully claim that a particular trade dress is worthy of protection, a plaintiff must show inherent distinctiveness, which is typically a low burden when emphasis is placed on a combination of elements and the total impact of that combination; but that same emphasis on combination tends to increase the difficulty of showing likelihood of confusion, since it is relatively easy for a competitor to use certain aspects of a particular trade dress without infringing upon the trade dress as a whole. *Id.* at 72 (citing *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 451 n.11, 54 U.S.P.Q.2d (BNA) 1594, 1609 n.11 (S.D.N.Y. 2000)).

¹⁶⁶ *Id.* at 72-73.

¹⁶⁷ *Id.* at 73.

elements must be removed from the overall impression because they are “generic.”¹⁶⁸

Ultimately, the court held that Best Cellars had protectable trade dress in the look and feel of its stores, and that triable issues of fact existed as to whether Bacchus’s trade dress infringed upon that of Best Cellars.¹⁶⁹ In so holding, the court properly applied the basic principles of trade dress law, which require it to consider the total look and feel of a particular claimed trade dress, rather than separating it out into component parts.

C. *Using Trade Dress to Protect Radio Formats*¹⁷⁰

1. **Basic Concepts**

Abercrombie II and *Best Cellars* are useful because they apply theories of trade dress to retail motifs, which is, essentially, the function of a radio station’s format. At its core, the purpose of a retail establishment’s trade dress is to draw people into the store and create an atmosphere that is unique to that particular retailer. Similarly, the primary function of a radio station’s format is to draw listeners to the station and create a listening experience that is unique to that particular station. The primary difference between the trade dress of a traditional retailer (such as Abercrombie & Fitch or Best Cellars), or restaurant (such as Two Pesos), and a radio station is that the trade dress of the former is often based primarily on a combination of visual elements, while because of the

¹⁶⁸ *Id.* at 71.

¹⁶⁹ *See id.* at 73, 81. The court also denied Best Cellars’ motion for summary judgment and granted Wine Made Simple’s motions for summary judgment as to Best Cellars’ claims for money damages, trademark dilution, and related state claims. *Id.* at 84.

¹⁷⁰ Readers eager to review an applied example of what precise elements might be combined to create a protectable radio format are urged to review Part III.C.3, *infra*, which provides an exemplary format that, under this article’s framework, would warrant trade dress protection.

nature of the industry, radio trade dress is based almost entirely on sonic or aural elements.¹⁷¹

As Justice Scalia noted in *Wal-Mart*, the interior decor of an establishment is either product packaging or some third undefined category—a *tertium quid*.¹⁷² Because a radio station’s “product” is its audience (or perhaps more accurately, access to that audience), it cannot be said that a radio format fits into either of the primary trade dress categories: product design or product packaging. But a station’s format functions quite similarly to the interior motif of a retail store or restaurant in that it attracts listeners; it seems, then, as if a radio station format, if it is to be protected, would be best treated as a *tertium quid* and entitled to treatment similar to that of product packaging.

Because a radio format is, in some aspects, simply a way for a station to market and promote itself, there exists a risk that courts might view a format as merely a “marketing theme,”¹⁷³ thereby rendering it unprotectable. A review of the marketing theme cases discussed *supra* in Part III.A.3, however, reveals that a properly defined radio format is more than a mere marketing theme. Rather, a properly defined format is a unique combination of elements that, if properly articulated, rises above the generality to which the court objected in *Haggen-Dazs*. Indeed, broadcasters seeking to employ a trade dress theory of protection must ensure that they can express, with specificity, the particular aspects or elements that make up the total look, feel, and sound of the radio format to avoid the issues present in *Landscape Forms*. But such elements cannot be *so familiar* within the radio industry so as to preclude protection, as the knife marketing trade dress in *Miracle Blade* or the magazine design in *Sports Traveler*. Thus, in crafting a protectable radio format, broadcasters should carefully articulate specific, highly unique and original elements that, in concert with one another, create a source-significant identifier of a particular programming model.

¹⁷¹ Radio stations do, however, expend considerable resources to create visual aspects of their brands, in an attempt to create an off-air image that is consistent with the on-air sound of the station. Together, these elements make up what programmers call “stationality.” See, e.g., *Billboard Broadcaster of the Week: B97’s Larson Toasts A Year In The Crescent City*, BILLBOARD, Sept. 20, 1997 (discussing “stationality” in terms of “how you present your station and how you serve your listeners”).

¹⁷² See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215, 54 U.S.P.Q.2d (BNA) 1065, 1069 (2000).

¹⁷³ See *supra* Part III.A.3.

Reviewing the two retail trade dress cases, discussed *supra* in Part III.B, is similarly helpful in determining the parameters of radio format protection using a trade dress theory. Unlike the sales techniques and store layouts in *Abercrombie II*, a radio station's format does not preclude competitors from competing in the same market, or even from seeking to attract the same target audience, since there are a number of competitive options—perhaps an infinite number—that are available to competitors. However, radio stations must define with specificity the elements that comprise its format because, as the *Best Cellars* court noted, the proper inquiry when considering the protectability of trade dress is the “combination that a customer would perceive,”¹⁷⁴ although the individual elements need not be individually protectable. Thus, a station seeking to create a format that is sufficiently unique to warrant protection under a trade dress theory need not concern itself that certain aspects of the format may be commonplace in the industry, thereby making those individual elements generic and devoid of protection. Similarly, stations need not worry that certain aspects of its format are legally functional, or that other radio stations in the industry, or even in the same local market, use some of the same or substantially similar elements. Instead, stations must focus on creating a complete source-identifying package of elements that, though capable of individual expression, come together to define the overall look, feel, and sound of the radio station.

2. Judicial Recognition

The idea of applying a trade dress theory to the protection of radio brands has yet to be tested by any court. The closest such case came in 1995, when CMM Cable Rep., Inc. (“CMM”) sued Ocean Coast Properties, Inc., owners of radio station WPOR in Portland, Maine (“WPOR”),¹⁷⁵ and the U.S. District Court for the District of Maine was asked to consider whether trade dress protection should apply to a particular radio station contest.¹⁷⁶

CMM had developed a direct mail-based marketing campaign for radio stations that took the form of an employment theme, entitled the “Payroll

¹⁷⁴ *Best Cellars*, 320 F. Supp. 2d at 72.

¹⁷⁵ *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 888 F. Supp. 192, 194, 36 U.S.P.Q.2d (BNA) 1458, 1460 (D. Me. 1995), *aff'd*, 97 F.3d 1504, 41 U.S.P.Q.2d (BNA) 1065 (1st Cir. 1996).

¹⁷⁶ *See id.* at 195-96, 36 U.S.P.Q.2d (BNA) at 1460-62.

Payoff.”¹⁷⁷ CMM’s business involved licensing such promotions to radio stations throughout the country on a market-exclusive basis; that is, the promotion was only available to one radio station in a particular market.¹⁷⁸ Because of prior business dealings with a competitor of WPOR, CMM “declined to license [its] promotion to WPOR,” which led the station to create its own promotion that was substantially similar to the promotion it sought to license from CMM.¹⁷⁹ CMM sued WPOR, primarily alleging copyright and trademark infringement, and arguing that the printed collateral materials, the broadcast scripts, and other written or printed works prepared by WPOR were substantially similar to CMM’s copyrighted works, and that its employment metaphor was likely to cause confusion with CMM’s materials.¹⁸⁰ Of particular interest here, however, is CMM’s claim of trade dress infringement: CMM asserted that it had protectable trade dress in “the employment concept, graphics[,] layout and look of Payroll Payoff”¹⁸¹ and the “graphics, layout, and look” of the promotion.¹⁸²

The court found that the claimed “employment concept” trade dress was really nothing more than the idea or theme of a radio promotion using an employment-related theme, and denied protection by applying the well-known principle that “trade dress protection is not given to marketing concepts or themes.”¹⁸³ In considering the “graphics, layout, and look”¹⁸⁴ of the promotion, the court compared the “look” of the two brochures: “WPOR’s is mostly blue and red while CMM’s is predominantly yellow, with smaller features in green, purple and red, and WPOR’s is decorated with a ‘clock theme’ while CMM’s features a boot, lariat, and lots of green cash.”¹⁸⁵ As the district court’s opinion was on a motion for summary judgment, the court assumed that CMM had established distinctiveness and non-functionality sufficient to warrant protection

¹⁷⁷ *Id.* at 195, 36 U.S.P.Q.2d (BNA) at 1460.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 195, 36 U.S.P.Q.2d (BNA) at 1461.

¹⁸⁰ *See id.* at 196-200, 36 U.S.P.Q.2d (BNA) at 1462-65.

¹⁸¹ *Id.* at 202, 36 U.S.P.Q.2d (BNA) at 1467.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

as trade dress.¹⁸⁶ The court then separated out the functional aspects from the nonfunctional aspects of the two promotions¹⁸⁷ and concluded that “no reasonable jury could find that the trade dress of the brochures is likely to confuse radio station promotional decisionmakers as to the source of each.”¹⁸⁸ Although the case eventually reached the Court of Appeals for the First Circuit, the trade dress issue received only a fleeting reference, as “CMM’s trade dress arguments in its memorandum of law in opposition to WPOR’s motion for summary judgment consisted of a mere five sentences and one citation.”¹⁸⁹ Because the issue received such limited treatment, the appellate court held that CMM had “failed to preserve its arguments for appeal and thus . . . we decline to consider the merits of CMM’s trade dress arguments.”¹⁹⁰

3. An Applied Example

The application of trade dress protection to a radio format is perhaps best illustrated with an example. Consider a radio station format with the following characteristics:¹⁹¹

- A unique and unconventional name for a radio station: Express 105. The name is a federally registered trademark for radio broadcasting services.¹⁹²

¹⁸⁶ *See id.*

¹⁸⁷ The court appears to have erred on this point. The great weight of authority holds that the proper inquiry on trade dress claims is not the protectability of the individual elements, but instead the distinctiveness, functionality, and commercial impact of the entire trade dress. *See, e.g., Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32, 35 U.S.P.Q.2d (BNA) 1284, 1287 (2d Cir. 1995).

¹⁸⁸ *CMM Cable Rep.*, 888 F. Supp. at 202, 36 U.S.P.Q.2d (BNA) at 1467.

¹⁸⁹ *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1527, 41 U.S.P.Q.2d (BNA) 1065, 1084 (1st Cir. 1996).

¹⁹⁰ *Id.*

¹⁹¹ Although some of these features may resemble those of various actual radio stations, they are not intentionally designed to mimic any one particular station. Any resemblance to an actual radio format is coincidental and unintentional.

¹⁹² The registrability of radio station names and frequency designators is an issue that is separate and distinct from the trade dress issues discussed

- A logo that features the silhouette of a bullet train and the word “Express” over it in a light fluorescent orange. A fluorescent red “105” appears underneath the “Express.”
- All of the station’s collateral materials (letterhead, envelopes, bumper stickers, television, print, and out-of-home advertisements) include the logo and a fluorescent red, orange, and purple color scheme configured to create a sense of energy and excitement.
- The station is music-based, featuring an unusual blend of genres and styles. The library is substantially comprised of rhythm & blues music that was released between 1985 and 1995; the second largest category of music in the library is dance music from 1975 through 1995; the third largest category of music is both rhythm & blues and dance music from 1995 to the present day.
- Each song is coded according to gender of the artist, as well as its sound (e.g., pop, dance, rhythmic), tempo, and the year of release. Music playlists are generated pursuant to a set of relatively strict rules relating to the proper music balance. During the day, a larger amount of the music is pulled from the 1975 to 1995 time period, while in the evening, the station sounds more “current,” with an emphasis on music from 1985 to the present day.
- Each song is assigned a tempo code, which is determined on a 1-5 scale; the average tempo for any given hour of music is always between 2.0 and 4.0 during the day, and between 3.5 and 4.5 during the evening.
- The station’s air personalities are all between the ages of 25-54, the same age group that comprises the station’s target audience. While on the air, the personalities always sound energized and excited; they almost sound as if they are shouting at times.
- There are 24 other radio stations in the same coverage area, two of which target exactly the same listener demographic: active, relatively affluent females aged 25-54 years old. Those stations are Mix 102, an active adult contemporary station, and Sunny 94.5, a light adult contemporary station.

presently. See generally MCCARTHY, *supra* note 67, § 7.17 (discussing registrability of broadcast frequency designations); see also Christopher S. Reed, *Zoning Out on Radio: Trademark Registration for Broadcast Brands*, GERMESHAUSEN CENTER NEWSLETTER (Franklin Pierce Law Center, Concord, N.H.), Winter/Spring 2005, at 5, available at <http://www.resources.piercelaw.edu/pubs/Germ05S.pdf> (discussing registrability of frequency designators and radio station names).

- Listener participation is a major component of the station. The station communicates with its listeners by telephone, e-mail, online chat services, and social networking web sites. Each hour, the air personalities are required to incorporate no fewer than five listener phone calls or email messages into their shows.
- The station uses an audio processing device to manipulate the station's signal, increasing the volume of certain frequency bands that it wants to emphasize (namely, the "low end" of the frequency range), while decreasing the volume of those it wants to deemphasize (namely, the "high end"). Such processing gives the station a "party" or "club" type sound.
- To make the station sound "hotter" than its competitors, all of the music is played back at a slightly increased speed, approximately two to three percent faster than normal playback speed.
- Each hour features two commercial breaks, neither of which ever exceeds four minutes. The first break always occurs between 20 and 25 minutes past the hour. The second break always occurs between 50 and 55 minutes past the hour.
- Weather forecasts are provided once per hour at the end of the first break. Air personalities are instructed to provide only general weather conditions, the high and low temperatures for the current day and the following day, and the current temperature.
- The station has a distinctive series of identification jingles that feature the station's name being sung in a distinctive melody by a 5-voice vocal group.
- The station uses a series of highly-produced, pre-recorded station identifiers that feature a distinctive pronunciation of the word "Express" in a baritone male voice, immediately followed by a distinctive, whispered pronunciation of "105" in a tenor female voice.

All of these combined characteristics make up the station's format, and when considered together, constitute protectable trade dress.¹⁹³

Certain elements of the format are clearly protectable under various other intellectual property theories. For instance, the logo and certain manifestations of the color scheme would likely be copyrightable, and the name "Express 105" already is, as the list of format characteristics notes, a federally registered trademark. Additionally, the various formulas and methods that are used to construct the music playlists, pursuant to the articulated music rules and policies, may be protectable as trade secrets, so long as they are properly protected and not readily discernable by third parties. On the other hand, other characteristics of the format are simply unprotectable, such as the average tempo of a typical hour of music, or the fact that the station slightly speeds up its music.

Furthermore, the hypothetical Express 105 format is almost certainly more than a "mere marketing theme," as it is comprised of elements that constitute a "precise expression of the character and scope of the claimed trade dress,"¹⁹⁴ thereby allowing a court to "evaluate how unique and unexpected the design elements are in the relevant market."¹⁹⁵ Additionally, the articulated elements of the format are more than a mere "combination and refinement of commonly used elements"¹⁹⁶ in other radio formats. Rather, they are a precise and specifically configured arrangement of programming features and tactics designed to attract a particular audience, and serving to identify a specific radio station—the fictitious Express 105.

¹⁹³ Of course, the question remains: precisely how many of these elements must be articulated in order to entitle a format to trade dress protection? Or, put differently, how many separate elements are required to elevate an otherwise unprotectable format to one that is sufficiently distinctive, so as to qualify for trade dress protection? Similar questions would appear in an infringement context as well, as an alleged infringer might change or eliminate certain elements, or add new elements, and then claim that it has created a new, noninfringing, and separately protectable format, rather than a mere copy of the existing format.

¹⁹⁴ *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381, 42 U.S.P.Q.2d (BNA) 1641, 1647 (2d Cir. 1997).

¹⁹⁵ *Id.*

¹⁹⁶ *Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F. Supp. 2d 1136, 1153, 63 U.S.P.Q.2d (BNA) 1265, 1276 (D. Nev. 2002).

In considering the distinctiveness and functionality of the Express 105 format, one must consider the asserted trade dress as a whole and not analyze each component separately—just as in *Abercrombie II*, where the Sixth Circuit held that although Abercrombie & Fitch’s catalog featured certain functional elements, those elements alone “[did] not make the catalog’s overall design functional.”¹⁹⁷ Indeed, there, as here, even though certain elements may serve some functional purpose, the unique selection and “arrangement of these features can constitute more than the sum of its non-protectable parts.”¹⁹⁸ Furthermore, under either the “comparable alternatives” test or the “effective competition” test,¹⁹⁹ the Express 105 format would be determined to be nonfunctional. Its unique arrangement of elements leaves sufficient comparable alternatives by which competitors may attract an audience of similar demographic composition, and protection of the format as trade dress would not hinder other radio stations from competing, since there are an infinite number of formats that a station might adopt, both in general terms and in terms of attracting a specific, demographically defined audience.

IV. CONCLUSION

Over the past ten years, the radio industry has changed dramatically. What was once thought to be a dying industry has recently experienced a revival, as new technologies have given rise to a bigger and more competitive market for radio and radio-like programming. These new competitive pressures and targeted programming models create a need to better secure intellectual assets (which comprise modern broadcast programming strategies) from unfair competition. Although conventional intellectual property regimes offer protection for various components of a particular radio station format, they fall short of extending such protection to a whole radio format in its entirety.

Through a creative application of trade dress law, however, it becomes possible to protect such formats as assets; provided, of course, that they are comprised of a series of specifically articulated elements that, when taken together, constitute a unique and source-significant identifier of a particular programming model. By requiring those asserting protection to demonstrate

¹⁹⁷ *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc. (Abercrombie II)*, 280 F.3d 619, 644, 61 U.S.P.Q.2d (BNA) 1769, 1785 (6th Cir. 2002).

¹⁹⁸ *Id.* at 644, 61 U.S.P.Q.2d (BNA) at 1786.

¹⁹⁹ *See id.* at 642, 61 U.S.P.Q.2d (BNA) at 1784.

that the format is distinctive and nonfunctional—just as an owner of a “conventional” trade dress might be required to demonstrate—the legal and broadcasting community can ensure a vibrant competitive landscape in the radio industry, while simultaneously minimizing the likelihood of consumer confusion and maximizing the return on investment for broadcasters and others who create, develop, and market radio station formats.