

A Trade Dress Approach to the Protection of Radio Brands

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Table of Contents

I. Introduction.....	1
A. Formats Defined.....	2
B. Current Protection Mechanisms.....	8
C. What is a Format: Articulating a Definition for the Modern Media Marketplace and the Need for a Clearly Defined Mechanism of Protection.....	11
II. Trade Dress Basics.....	14
A. Core Concepts and Definitions.....	14
B. The <i>Abercrombie</i> Spectrum and the Role of Distinctiveness.....	16
C. Functionality.....	18
III. Application to Trade Dress Law to Radio Formats.....	19
A. Threshold Considerations.....	19
1. Packaging versus Design: The Role of a Radio Station and its Format.....	19
2. Functionality.....	20
3. Formats as Mere “Advertising Themes”.....	22
B. Lessons from Retailers.....	25
1. <i>Abercrombie & Fitch v. American Eagle Outfitters</i>	26
2. <i>Best Cellars v. Wine Made Simple</i>	30
C. Using Trade Dress to Protect Radio Formats.....	34
1. Basic Concepts.....	34
2. Judicial Recognition.....	36
3. An Applied Example.....	38
IV. Conclusion.....	42

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Abstract

Over the past ten to fifteen years the radio industry has undergone dramatic changes in terms of both programming and the economic model that underlies the industry's very existence. Despite the widespread industry consolidation that took place after the passage of the Telecommunications Act of 1996, advances in technological innovation have led to a diversity of new media options that have changed the way that people consume radio programming and the way advertisers reach their target audiences. Broadcasters have responded by creating niche-oriented formats designed to attract more narrowly defined segments of the listening population. As the programming becomes more complex, and secondary markets in the packaging and licensing of such formats begin to develop, there has become a need to articulate a mechanism by which broadcasters may protect radio formats as intellectual assets.

While conventional intellectual property concepts are sufficient to protect various aspects of a radio format, broadcasters have traditionally had difficulty asserting protection for complete formats. This paper articulates a theory by which broadcasters may assert protection on a complete, sufficiently distinctive format. By conceptualizing the role of a radio station as a player in a two-sided market, using programming as merely a mechanism to secure listeners of a specifically defined demographic profile, then "selling" access to those listeners to advertisers, it becomes possible to consider the station's format as its trade dress, best categorized as a *tertium quid*, the phantom third category of trade dress (in addition to product packaging and product design) raised by Justice Scalia in *Wal-Mart Stores, Inc. v. Samara Brothers*. Using conventional trademark and trade dress principles, this paper then argues that a radio station's format is analogous to the interior motif of a restaurant or retail store and, provided the format can meet the threshold requirements, should be entitled to protection.

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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^[4] ... [a]nd every city’s got a ‘Kiss.’”⁵ 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,⁶ 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. And as the media marketplace has become more competitive, programming has become more fragmented. New programming formats are today

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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: JAM Radio IDs, <http://www.jingles.com/jam/radioids/index.html> (last visited Mar. 1, 2006).

² See JAM Creative Productions: The JAM Song, <http://www.jingles.com/jam/collector/jamsong.html> (last visited Mar. 1, 2006).

³ *Id.*

⁴ Referring to radio station call letters which 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 JAM Creative Productions: The JAM Song Lyrics, <http://www.jingles.com/jam/gfx/jamsongback.gif> (last visited Mar. 1, 2006).

⁶ A station search on the web site of Clear Channel Communications, the company that owns the KISS brand, reveals there are 59 stations branded as KISS. See Clear Channel Radio Station Search, <http://www.clearchannel.com/Radio/StationSearch.aspx?RadioSearch=KISS> (last visited Mar. 1, 2006).

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 programming methods is so central to a company's business model⁷ that protection of the format against "copycats" becomes of paramount importance.⁸

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 of a "radio format" and then, using trade dress law, proposes one way in which format owners might assert rights in their programming concepts in an effort to maximize return on their creative investment.

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, particular when there's competition in the format."⁹

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: station names¹⁰ tend to

⁷ Bohn & Associates Media, a Canadian broadcast consulting firm, in association with SparkNet Communications have, for example, created "radio's fastest-growing brand" now licensed on nearly forty radio stations throughout the United States and Canada. JACK-FM "Playing What We Want," <http://www.jack.fm> (last visited Mar. 1, 2006).

⁸ See, e.g., First Amended Complaint for Injunctive Relief and Damages ¶¶ 13-18, Bohn & Assocs. Media Inc. v. Bonneville Int'l Corp., No. 05C-2677 (N.D. Ill. June 8, 2005).

⁹ ERIC G. NORBERG, RADIO PROGRAMMING: TACTICS AND STRATEGY 18 (1996).

¹⁰ 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 to which it is licensed by the Federal Communications Commission ("FCC"). Such brands can be contrasted with call letters, which are assigned by the FCC to every licensed radio station and serve as formal, legal identification of the station. While some stations have chosen to use their

correlate with the music type and are generally fairly generic.¹¹ 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.¹² 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, such as CHR/Rhythmic stations, which feature a mix of conventional pop music along with the addition of certain urban titles while CHR/Mainstream stations tend to play the same pop music tracks but with more of a rock or alternative music skew. 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 itself, but in the mid 1990s fragmentation began to take hold, giving rise to host of new splinter formats, including Hot AC, Bright AC, Soft AC, and so forth, each featuring roughly similar musical styles but differing in the way the music was presented and delivered. But even with this fragmentation, the resultant formats remain rather generic: they can be defined almost entirely by the type of music they play. Aside from the station’s unique call letters, there is little basis upon which to distinguish one station apart from another station.

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

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 create entirely separate brand identities that have little connection to their call letters (e.g., KQKS/Denver branded as KS-107.5, or WSTR/Atlanta branded as Star 94).

¹¹ 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), Smooth Jazz 104.3 (KJCD/Denver).

¹² NORBERG, *supra* note 9, at 19.

early 2003 when Infinity Broadcasting's¹³ WNEW-FM in New York transitioned from an "FM Talk [format] targeting men" to a "new female-targeted format ... called '102.7 Blink.'" which was rather unique in that it was designed to "combine contemporary music ... with entertainment, celebrity news and gossip, fashion and pop culture."¹⁴ In addition to the unique blend of music and talk programming, the station's "on-air personalities won't be confined to strict playlists"¹⁵ since such tight playlists are typically a hallmark feature of most adult contemporary formats.¹⁶ The Blink format was seen as a potential model for large communications conglomerates, like Viacom, to leverage creative assets across multiple platforms, thereby increasing their return on investment. 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."¹⁷

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 love."¹⁸ 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.¹⁹ In sum, the format, as it was initially launched, was a unique and arguably protectible format that devolved into a generic and likely unprotectible format based almost entirely upon a particular style of music.

¹³ Infinity Broadcasting, now known as CBS Radio, is a subsidiary of Viacom.

¹⁴ Katy Bachman, *Infinity Reveals Details of "102.7 Blink,"* MEDIAWEEK, Apr. 10, 2003.

¹⁵ *Id.*

¹⁶ JOANNA R. LYNCH & GREG GILLISPIE, PROCESS AND PRACTICE OF RADIO PROGRAMMING 22 (1998).

¹⁷ Bachman, *supra* note 14.

¹⁸ Marc Schiffman, *Tuned in: Radio: Format Change in a Blink,* BILLBOARD, Sept. 27, 2003

¹⁹ Katy Bachman, *New York Radio Stations; WNEW-FM's Format Gone in a Blink, Replaced by Mix Formula,* MEDIAWEEK, Jan. 5, 2004.

Despite the ultimate failure of Blink, which took months of research and planning, and millions of dollars to create,²⁰ had the format proved successful, there are indications that Infinity Broadcasting had plans to syndicate the format, potentially launching it on other Infinity-owned radio stations.²¹ Indeed, *Detroit Free Press* reporter John Smyntek believed the format might find a home on a lagging Detroit radio station, noting that “[i]f [Blink] catches on, there’ll be a race to convert a lagging Infinity property ... to it.”²²

Although Infinity’s Blink format ended unsuccessfully, other programmers have enjoyed great success with creating and developing innovative new formats. In 2000, a former radio professional, started an Internet-based radio station, featuring random music selection and a deep and diverse music library.²³ Dubbed “Jack,” the format was so unique and pioneering, an FM radio station in Vancouver licensed the format and brand in 2002. 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.²⁴

²⁰ Bachman, *supra* note 14.

²¹ 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 Fed. TM Reg. Serial Nos. 78225305, 78225603. The latter suggests that Viacom perhaps had plans to offer Blink-related programming services to stations beyond WNEW.

²² John Smyntek, *Infinity Says Its New Idea is a One-Stop-Shopping Format*, DETROIT FREE PRESS, Apr. 14, 2003, at 2E.

²³ Joel Stein, *You Don’t Know Jack*, TIME, Sept. 5, 2005, at 48.

²⁴ JACK-FM “Playing What We Want,” <http://www.jack.fm> (last visited Mar. 1, 2006).

As described by one of the format’s co-creators, “Jack stations are build on unique principles that go far beyond the music and weave through every aspect of the radio station.”²⁵ Jack’s presentation is described as “innovative and even progressive” and “clearly distinguished from other stations.”²⁶ 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.’”²⁷ The format’s “personality” is described as “pro listener” but not “anti-radio” and “mildly contemptuous of transparently formatted radio,” and “Jack is honest ... Jack won’t take requests, and pokes fun at the very thought by airing ‘The No-Request Nooner’ in some markets.”²⁸ 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;^[29] (d) no weather information; (e) no traffic information; (f) no news; (g) no announcements of special events in the local area; (h) no discussions or on-air commentary; and (i) the same name – i.e., ‘Jack FM’ – across all stations.”³⁰

Indeed from this brief description it is clear that the format is more than a mere music-based style of programming, but a complete brand designed to attract listeners of a specific demographic and psychographic profile and attract advertisers desiring to reach those specific listeners. But like most successful enterprises, Jack has seen its fair share

²⁵ Mike Henry, *Jack Clones and Wannabes Beware!*, RADIO & RECORDS, Apr. 8, 2005.

²⁶ Larry Johnson, *Jack FM Sweeping the Nation* (Paragon Media Strategies Report), Jun. 10, 2005.

²⁷ *Id.*

²⁸ *Id.*

²⁹ The format owners would likely disagree with this statement.

³⁰ *Sparknet Commc’ns., L.P., v. Bonneville Int’l Corp.*, 386 F. Supp. 2d 965, 974-75 (2005).

of attempts at imitation, mostly radio stations trying to compete off of the uniqueness of giving a radio station a human name and playing what appears to be an endless and random mix of music.³¹ The general format concept has become so popular that it has given rise to a generic descriptor: variety hits.³² But as the formats originators have said, “[s]imply giving a station a human name does not create a unique market position.”³³ Moreover, such imposter stations often attempt to create the classic Jack sound by simply widening the diversity of the music they play, but again, the formats originators note that in most instances “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*³⁴ and the core of these stations.”³⁵

Although most of these 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 that use slogans that, in 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

³¹ For example, WWRZ/Lakeland, Florida branded as Max FM, WMKK/Boston branded as Mike FM; KNLT/Walla Walla, Washington branded as Bob FM.

³² Variety Hits – The Adult Hits, JACK-FM, Bob FM format website, <http://www.varietyhits.com> (last visited Mar. 1, 2006).

³³ Henry, *supra* note 25.

³⁴ “Cume” is one metric by which radio audiences are measured. It is defined by Arbitron, the leading provider of radio ratings services, 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 Terms for the Trade, http://www.arbitron.com/downloads/terms_brochure.pdf (last accessed Mar. 1, 2006).

³⁵ Henry, *supra* note 25 (emphasis in original).

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, Bohn & Assocs. Media Inc. v. Bonneville Int’l Corp., No. 05C-2677 (N.D. Ill. Nov 16, 2005).

³⁷ Fed. TM Reg. No. 2884478.

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 in this instance 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 which 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 which make up a particular format, such as the jingles,⁴¹ imaging elements,⁴² and any written materials used in the preparation of the

³⁸ Sparknet, 386 F. Supp. 2d at 968.

³⁹ *Id.* at 979.

⁴⁰ See 17 U.S.C. § 101 (2000).

⁴¹ See *supra* note 1.

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.

format⁴³ or the on air presentation thereof⁴⁴ may also be copyrightable.⁴⁵ Any printed promotional materials used by the station are likely also 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 protectible as trademarks and can be entitled to federal registration.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 also had some success at protecting their brands through the use of sound marks, such as the widely-known NBC chimes,⁵⁰ and other musical signatures, like the six note melody used by ESPN to identify its programming.⁵¹ Clear Channel subsidiary Citicasters owns a federal registration on a distinctive pronunciation and delivery of the phrase “KISS-FM,”⁵² for example, and

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 9, 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. Although today, 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 id.* § 102(5) (extending copyright protection to pictorial, graphical, and sculptural works).

⁴⁷ *See supra* note 10.

⁴⁸ *See In re WSM, Inc.*, 1985 TTAB LEXIS 118, *10 (T.T.A.B. 1985).

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

⁵⁰ Fed. TM Reg. No. 916522 (“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 Fed. TM Reg. No. 2450525 (“The mark consists of the following six musical notes played in a fast tempo: “D, C sharp, D, D, C sharp, D.”)

⁵² Fed. TM Reg. No. 2733629 (“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.”)

Fisher Broadcasting has also successfully registered a sound mark to identify its stations.⁵³

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

⁵³ Fed. TM Reg. No. 2672479 (“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, 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 substained 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.”)

⁵⁴ Although trade secret law is generally state law, thus making the precise definition vary from state-to-state, generally a trade secret is simply something that is maintained as a secret, and has 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 and juxtaposed with certain other songs or programming elements. *See, e.g.*, NORBERG, *supra* note 9, 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 5 songs of a Genesis song; although the artists are, in a literal sense, different, because Phil Collins serves as the lead singer of Genesis, the sound of the music is typically quite similar). The latter prevents too many songs from male or female artists playing 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.

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. What is a Format: Articulating a Definition for the Modern Media Marketplace and the Need for a Clearly Defined Mechanism of Protection

The review of current intellectual property protection mechanisms in part I.B., above reveals that broadcasters must currently take a piecemeal approach to the protection of radio formats, using copyright, trademark, and trade secret principles to guard various aspects of their programming against imitators. While this approach may offer a sufficient shield against the misappropriation of those individual elements, it fails to recognize that there is economic value in not only the individual elements, but also the unique configuration of those elements into a distinctive “sound” of a radio station that ultimately is designed to target listeners of a specific demographic and psychographic profile. And such, then, forms the basis of the working definition of a format that will be used for the purpose of this paper: a unique composition of individually protectible and unprotectible programming elements which, when properly configured, are indicative of the source of a particular radio station’s programming.

The need for an effective method protection for such programming formats is becoming more important as the packaging and distribution of audio content across multiple platforms becomes more widespread. 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. While just a few years ago there were substantial barriers to entry into 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.⁵⁸ Commercial media have responded with the development of new technologies, including digital radio, which allows radio stations to transmit multiple signals over existing bandwidth, thereby creating what operate effectively as separate radio stations,⁵⁹ and satellite radio, which essentially creates a nationwide radio system using direct broadcast satellite transmissions and requires listeners to have special satellite radio receivers. There are currently two providers of such satellite radio services, each offering nearly 100 distinct channels of programming.⁶⁰ Such technological innovation has led to an increased need for programming, and for the development of programming that targets more narrowly defined target audiences than ever before, and such programming innovation 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 investment.

In addition to various technological innovations that have given rise to new formats, economic innovation in the traditional radio broadcasting industry has also established a need for a protection mechanism for radio formats. Clear Channel

⁵⁸ See, e.g., Create and Broadcast Your Own Radio Station, <http://www.live365.com/broadcast/index.live> (last accessed Mar. 26, 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.”)

⁵⁹ iBiquity Digital – HD Radio: What is HD Radio?, <http://www.ibiquity.com/hdradio/whatishdradio.htm> (last accessed Mar. 26, 2006) (listing one of the benefits of high definition radio as 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 etc., along with a host of other services.”)

⁶⁰ See XM Radio – Learn About XM, <http://www.xmradio.com/learn/index.jsp> (last accessed Mar. 26, 2006) (noting that XM Radio “features over 160 digital channels”); see also Sirius Satellite Radio – FAQs, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032792> (last accessed Mar. 26, 2006) (noting that Sirius Satellite Radio “is a service offering over 125 channels of satellite radio...”).

Communications, the largest owner of radio stations in the United States, has arguably been on the forefront of such economic innovation, by developing networks of similarly-formatted radio stations and swapping programming elements between them.⁶¹ As noted above, Clear Channel currently operates nearly 60 radio stations under its “KISS-FM” brand name,⁶² with most KISS stations featuring similar logos, on-air imaging, and in some cases, even the same on-air personalities.⁶³ Programming for KISS stations often sounds highly standardized, with a KISS station in one market sounding remarkably similar to KISS stations in other markets.⁶⁴ Indeed, it appears Clear Channel has adopted a functional structure that mimics 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. Just as a retail chain or franchisor can protect its “system,” with careful application of existing legal principles, proprietors of radio formats may be able to obtain protection for their formats.

Using the above-articulated definition, it becomes possible to consider 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,

⁶¹ 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 STREET JOURNAL, Feb. 25, 2002, at A1.

⁶² *Supra* note 6.

⁶³ 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 violates federal law which requires radio stations serve in the local public interest. 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 (last accessed Mar. 26, 2006).

⁶⁴ Mathews, *supra* note 61.

however, and the creation of a brand new form of protection just for a single industry would be inefficient. As this article discusses below, if one considers a format as a source-significant identifying feature of a radio station, it becomes possible to think of a particular radio station's format as its packaging, at which point an application of trade dress law becomes 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.”⁶⁵ The concept of trade dress emanates from the language of the Lanham Act of 1946,⁶⁶ which provides for the protection of trademarks, defined to include “any word, name, symbol, or device, or any combination thereof”⁶⁷ 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 trade dress protection is available for the motif of a restaurant,⁷⁰ the display and presentation of products in a retail establishment,⁷¹ and the

⁶⁵ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8.4 (2005).

⁶⁶ 15 U.S.C. § 1051, *et seq.*

⁶⁷ *Id.* at § 1127.

⁶⁸ *Id.*

⁶⁹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 152 (1995)

⁷⁰ *See, e.g., Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

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

general look and feel of a line of greeting cards, even though the individual elements of which the trade dress is comprised may have been individually unprotectible.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 the product ... [i]t is the part that is discarded when one uses the product.”⁷⁴ Packaging of a particular product is not to be confused with labels and other identifying materials that may be affixed to such packaging, which is not protectible 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 itself is 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 Brothers, Inc.*,⁷⁸ Justice Scalia, discussing the holding in *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 décor of a restaurant, held to be protectible trade dress under *Two Pesos*, was to be considered either product packaging or the undefined third category which, essentially, is like packaging,

⁷² See, e.g., *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32 (1995).

⁷³ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000).

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

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 256.

⁷⁸ *Wal-Mart*, 529 U.S. at 205.

⁷⁹ *Two Pesos*, 505 U.S. at 763.

⁸⁰ *Wal-Mart*, 529 U.S. at 215.

yet sufficiently different to warrant separate categorization.⁸¹ Since the *Wal-Mart* case, the 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 as trade dress, falling into the *tertium quid* category.⁸⁴ The Court of Appeals for the First Circuit 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...”⁸⁵ was more like product design and configuration as opposed to product packaging or the undefined *tertium quid*.⁸⁶

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*,⁸⁷ which organizes trademarks into four categories: generic, descriptive, suggestive, and arbitrary or fanciful.⁸⁸ 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

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)).

⁸⁴ *Id.* at 274 (citing *Vasquez v. Ybarra*, 150 F. Supp. 2d 1157, 1158-59 (D. Kan. 2001)).

⁸⁵ *Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC*, 259 F.3d 25, 40 (1st Cir. 2001).

⁸⁶ *Id.*

⁸⁷ 537 F.2d 4 (2d Cir. 1976).

⁸⁸ *Id.* at 9

product is a species”⁸⁹ and as such are entitled to no trademark protection.⁹⁰ 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.⁹¹ 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 the goods” or services.⁹² Finally, arbitrary or fanciful marks are those that have no connection with the goods or services to which they are affixed.⁹³ Arbitrary marks are real words that are used in a context that is unrelated to the primary meaning of the word, whereas fanciful marks are “words invented solely for their use as trademarks.”⁹⁴ 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 ...”⁹⁵ Inherently distinctive marks do not require any showing of secondary meaning or acquired distinctiveness in order to be protected as trademarks.⁹⁶

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.⁹⁷ 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

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 10.

⁹² *Id.* at 11 (citing *Stix Prods., Inc. v. United Merchs. & Manufs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Two Pesos*, 505 U.S. at 768.

⁹⁶ *Id.* at 769

⁹⁷ *Wal-Mart*, 529 U.S. at 212.

attaching a particular word to a product, or encasing it in a distinctive packaging, is most often to identify the source of the product.”⁹⁸ Thus, product packaging is inherently distinctive, and requires no showing of secondary meaning or acquired distinctiveness to constitute protectible trade dress, while product design requires such a showing before trade dress protection is available.⁹⁹ 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.”¹⁰⁰

C. *Functionality*

Trade dress is only protectible 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.”¹⁰¹ Similarly, if an element of a product container or wrapper is commonplace, it is not entitled to trade dress protection.¹⁰² 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,¹⁰³ whether advertising for the product touts any utilitarian aspect of the design,¹⁰⁴ and facts about the design and manufacturing, such as whether the design was chosen because it makes manufacturing easier or cheaper.¹⁰⁵

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 215.

¹⁰¹ McCarthy, *supra* note 65, § 8:20.

¹⁰² *Id.*

¹⁰³ See *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001).

¹⁰⁴ See *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 823 (9th Cir. 1993) (citing *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1121 (Fed. Cir. 1985)).

¹⁰⁵ See *id.*

There are six popularly used “tests” for determining functionality of a particular trade dress,¹⁰⁶ two of which appear to be the most common: the comparable alternatives test, and the effective competition test.¹⁰⁷ 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 not functional.”¹⁰⁸ 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.¹⁰⁹

III. Application to 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.¹¹⁰ But the economics of broadcasting demonstrate that the relationship between a radio station and its listeners is more complex, since, in most cases, a radio station generates its revenue by selling airtime to

¹⁰⁶ Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress Protection*, 83 CORNELL L. REV. 1116, 1144 (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’”).

¹⁰⁷ *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 642 (6th Cir. 2000) [hereinafter *Abercrombie II*].

¹⁰⁸ Wong *supra* note 106, at 1144-45.

¹⁰⁹ *Id.* at 1149.

¹¹⁰ NORBERG, *supra* note 9, at 1-6.

advertisers, usually in small units or batches of small units.¹¹¹ Of course, without any listeners, there would be few, if any, advertisers willing to pay a radio station for access to its airwaves. A typical commercial radio station,¹¹² then, 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. 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

Under neither test of functionality discussed above, is a radio station’s format functional. If one considers a radio station’s format is simply a mechanism by which the station attracts a particularly defined audience, but for any one set of audience characteristics there may be countless other formats and related programming strategies and techniques to attract the same audience. While it is true that a particular format is

¹¹¹ 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.

¹¹² 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.

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 will attract them. Although the radio industry has become rather set in its ways about which format successfully attract certain demographics, this is though to be due largely to professional lethargy and not because there is only a limited number of formatting options available. The rapidly changing and increasingly competitive nature of the radio industry is forcing broadcasters to become more creative with their programming and to find new ways of attracting certain audience segments.¹¹³

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.”¹¹⁴ 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. The protection of a station’s sufficiently distinctive format would not

¹¹³ On March 22, 2006, two new radio stations launched in the Denver market, both featuring innovative formats designed to audiences that were already targeted to 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 McLaughlin, 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> (last accessed Mar. 22, 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).

¹¹⁴ *Abercrombie II*, 280 F.3d at 643.

hinder the ability of other radio stations in the market from competing, because the station seeking to protect its format is not 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 competing for the same audience if one station's format – their mechanism of attracting an audience – were protected.

3. Formats as Mere “Advertising Themes”

Perhaps the greatest challenge to the notion that radio formats are protectible trade dress comes from the widely accepted view that mere advertising or marketing “themes” are not protectible. For example, in *Haagen-Dazs, Inc. v. Frusen Gladje Ltd.*,¹¹⁵ an ice cream manufacturer's trade dress was characterized as a “unique Scandinavian marketing theme.”¹¹⁶ The court rejected the assertion that such a theme constituted protectible 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.¹¹⁷

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.

Later cases have also raised the policy concerns of protecting overly-general marketing themes as opposed to specifically defined trade dress. In *Landscape Forms*,

¹¹⁵ 493 F. Supp. 73 (D.C.N.Y. 1980).

¹¹⁶ *Id.* at 75.

¹¹⁷ *Id.*

Inc. v. Columbia Cascade Co.,¹¹⁸ a manufacturer of outdoor furniture was denied trade dress protection for the design of its products.¹¹⁹ In holding that its alleged trade dress was actually an “unprotectable style, theme or idea”¹²⁰ the court explained that while the appropriate inquiry in a trade dress case is the “‘overall look’ of a product,”¹²¹ a party asserting trade dress production may not “dispense with an articulation of the specific elements which comprise its distinct dress.”¹²² 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,”¹²³ and similarly “will [] be unable to shape narrowly-tailored relief if [the courts] do not know what distinctive combination of ingredients deserve protection.”¹²⁴ 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.”¹²⁵ A trade dress owner must thus 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*.¹²⁶ There, a distributor of knife sets that marketed its wares

¹¹⁸ 113 F.3d 373 (2d Cir. 1997).

¹¹⁹ *Id.* at 375.

¹²⁰ *Id.* at 381.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 207 F. Supp. 2d 1136 (D. Nev. 2002).

primarily by way of television infomercials claimed 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.”¹²⁷ 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.”¹²⁸ Specifically, many of the elements of the Miracle Blade infomercial were “actually recycled from prior knife commercials”¹²⁹ and “similar combinations of the knives ... have been offered by others.”¹³⁰ The court ultimately held that the purported “trade dress is simply not a unique one”¹³¹ 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.”¹³²

Similarly, in *Sports Traveler, Inc. v. Advance Magazine Publishers, Inc.*,¹³³ 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

¹²⁷ *Id.* at 1152.

¹²⁸ *Id.* at 1153.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *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 and thus entitled to protection. The court ultimately held that it had not acquired such secondary meaning and was thus not entitled to protection. *Id.* at 1153-54.

¹³³ 25 F. Supp. 2d 154 (S.D.N.Y. 1998).

another; and (5) a feminine, sports-oriented model depicted in an active setting.¹³⁴

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,¹³⁵ and the use configuration of the various title elements was generic when compared with other magazines.¹³⁶ 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 the 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.¹³⁷

Thus while 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 articulable, sufficiently distinctive, source-identifying elements that comprises 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 the sonic equivalent of the "look and feel" of a retail establishment, a review of select cases involving retail trade dress is instructive.

¹³⁴ *Id.* at 162.

¹³⁵ *Id.* ("The fonts used for the words 'sports' and 'traveler' are not unique because the fonts used are available 'off the shelf'").

¹³⁶ *Id.* at 163.

¹³⁷ *Id.* (citing Milstein, 58 F.3d at 32-33)

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

As discussed above, in *Two Pesos*, the Court held that the interior look and feel of a Mexican restaurant was protectible trade dress, noting in a later case, that such interior motif was a form of product packaging.¹³⁸ In that subsequent case, the Court noted that if such a form of trade dress was not packaging, it was something “that is akin to product packaging.”¹³⁹ The Court of Appeals for the Sixth Circuit was called upon to apply these principles in *Abercrombie & Fitch Scores, Inc. v. American Eagle Outfitters, Inc.* (“*Abercrombie II*”),¹⁴⁰ where apparel retailer Abercrombie & Fitch brought suit against American Eagle Outfitters for infringement of the former’s trade dress.¹⁴¹ 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.

¹³⁸ *Wal-Mart*, 529 U.S. at 215.

¹³⁹ *Id.*

¹⁴⁰ *Abercrombie II*, 280 F.3d at 619.

¹⁴¹ *Id.* at 624.

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 “cutout” 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 “Abercrombie sales associate team,” which is comprised primarily of college students.¹⁴²

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.”¹⁴³

As regards the first category, “the designs of the goods themselves,”¹⁴⁴ 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.”¹⁴⁵ The court recognized that “[a]fter [*Wal-Mart*], no product configuration can meet the distinctiveness requirement of the Lanham Act by a showing of inherent distinctiveness

¹⁴² *Id.* at 625 (internal citations omitted).

¹⁴³ *Id.* at 633.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 637.

but must rely instead on acquired distinctiveness.”¹⁴⁶ The court considered American Eagle Outfitters’ “limited admission of intentional copying^[147] constitutes evidence that Abercrombie’s [trade] dress has acquired secondary meaning”¹⁴⁸ and accordingly, found the clothing designs to be sufficiently distinctive so as to warrant trade dress protection.¹⁴⁹

But in conducting its functionality review, the court 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 with the fabric, color, and design palettes.¹⁵⁰ In holding that the Abercrombie design trade dress was 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.”¹⁵¹ 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”¹⁵² – noting that despite their distinctiveness, the functional nature of those features precludes trade dress protection.¹⁵³

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 626 (“... American had admitted intentional copying for purposes of [a preliminary motion] ...”).

¹⁴⁸ *Id.* at 639.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 643.

¹⁵¹ *Id.*

¹⁵² *Id.* at 633.

¹⁵³ Specifically, with respect to Abercrombie’s use of college students as the primary source of its in-store workforce, the court explained that “[f]orbidding 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.* at 644.

Considering Abercrombie’s second claim to protection – “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”¹⁵⁴ – the court was more forgiving. Abercrombie’s catalog was comprised of numerous elements, including: “... a ‘cutout’ or ‘clothesline’ style¹⁵⁵ and uses 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.”¹⁵⁶ Further, the lifestyle content was presented in such 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 attempting to create a sexual mystique about the wearer.”¹⁵⁷ The court held that while 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.”¹⁵⁸ 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.”¹⁵⁹

Considering functionality, the court effectively applies the comparable alternative test and explains 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

¹⁵⁴ *Id.* at 633.

¹⁵⁵ The court later describes this style as: “the garments appear on the page as if hanging from a clothesline, *i.e.*, not on a model.” *Id.* at 644-45.

¹⁵⁶ *Id.* (internal citations omitted).

¹⁵⁷ *Id.* at 645.

¹⁵⁸ *Id.* at 644.

¹⁵⁹ *Id.*

options.”¹⁶⁰ Similarly, the court notes that “[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.”¹⁶¹ Finally, considering the editorial content that Abercrombie claimed set its catalog apart from its competitors, the court 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,”¹⁶² and that “mail order retailers can still sell their clothes and create an aura about their products without including such content, although this methods seems to have recently become a particularly effective way of creating demand.”¹⁶³ 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 alternative 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 a manufacturer to compete effectively in the market.”¹⁶⁴ But because Abercrombie had failed to show a likelihood of demonstrating success on its ultimate claim of trade dress infringement, the court affirmed the trial court’s granting of summary judgment in favor of American Eagle Outfitters.¹⁶⁵

2. *Best Cellars v. Wine Made Simple*

Another retail trade dress case that is of some value to considering the application of trade dress concepts to radio formats was recently decided in the Southern District of

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 645.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 648.

New York. In *Best Cellars, Inc. v. Wine Made Simple, Inc.*,¹⁶⁶ 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.¹⁶⁷ Best Cellars launched its first store in New York City in 1996, and was the brainchild of a wine connoisseur interested in designing “‘totally new kind of retail store for wine’ intended to simplify the wine shopping experience for the novice wine consumer.”¹⁶⁸ The store’s central concept is to organize wines by taste category, and its claimed trade dress 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.’”¹⁶⁹ Specifically, Best Cellars claims 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 positioned at eye level, below each display bottle; (8) bottles vertically aligned in rows of nine; (9) storage cabinets located beneath vertically aligned bottled; (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.¹⁷⁰

¹⁶⁶ 320 F. Supp. 2d 60 (S.D.N.Y. 2003).

¹⁶⁷ *Id.* at 66-67.

¹⁶⁸ *Id.* at 65 (internal citations omitted).

¹⁶⁹ *Id.* at 66.

¹⁷⁰ *Id.* at 69.

Best Cellars unique store design and method of selling wine has achieved substantial media attention,¹⁷¹ and, at the time of suit, operated four additional stores¹⁷² and licensed its system to one additional store.¹⁷³

The Court began its distinctiveness discussion by citing the *Wal-Mart* court, noting that “the interior décor category fits awkwardly into the classifications of trade dress law, constituting either product packaging or a ‘*tertium quid*’ akin to product packaging,”¹⁷⁴ and that “[i]nterior décor is [] clearly *not* product design.”¹⁷⁵ Just as the Court of Appeals did with the *Abercrombie II* case, the court here emphasized the importance of considering trade dress not as individual elements, but as a combination when determining whether a claimed trade dress is distinctive.¹⁷⁶ This is, in part, because the combination of elements “is the combination that a customer would perceive upon entering the store.”¹⁷⁷ The court was careful to explain that certain individual aspects of Best Cellars’ trade dress may not be individually protectible, much as the court noted in

¹⁷¹ *Id.* at 66.

¹⁷² Brookline and Boston, Massachusetts, Washington, D.C., and Seattle, Washington. *Id.*

¹⁷³ Great Barrington, Massachusetts. *Id.*

¹⁷⁴ *Id.* at 70 (citing *Wal-Mart*, 529 U.S. at 215.).

¹⁷⁵ *Id.* (emphasis in original).

¹⁷⁶ *Id.* at 71. The court explains:

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. (replaced text in original) (citations omitted).

¹⁷⁷ *Id.* at 72.

Abercrombie II when considering the various elements of Abercrombie & Fitch’s trade dress.¹⁷⁸ Specifically, the court notes that:

some elements of Best Cellars’ trade dress are related to the marketing theme of selling wine by taste, those elements are not dispositive. While the 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.¹⁷⁹

Ultimately the court finds that the Best Cellars’ trade dress is inherently distinctive and therefore warrants trade dress protection. In its opinion, 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 a 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 elements must be removed from the overall impression because they are “generic.”¹⁸⁰

Thus, the court properly applied the basic principles of trade dress law which required that it consider the total look and feel of a particular claimed trade dress and not separates it out into component parts. Ultimately, the court held that Best Cellars had

¹⁷⁸ *Id.* at 72-73. The court also points 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 emphasis on the 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 (S.D.N.Y. 2000)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 71.

protectible 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.¹⁸¹

C. Using Trade Dress to Protect Radio Formats

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 create 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 that to that particular station. The primary difference between the trade dress of a traditional retailer, such as Abercrombie & Fitch or Best Cellars, or a restaurant, like Two Pesos, and a radio station, is that the trade dress of the former is typically based primarily on a combination of visual elements, while because of the nature of the industry, radio trade dress is based almost entirely on sonic or aural elements.¹⁸²

As Justice Scalia noted in *Wal-Mart* the interior décor of an establishment is either product packaging or some third undefined category – a *tertium quid*. 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

¹⁸¹ *Id.* at 84. 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.*

¹⁸² Radio stations do, however, expend considerable resources to create visual aspects of their brands that 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."

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 ways, simply a way that the station markets and promotes itself, there exists a risk that courts might view a format as merely a marketing theme,¹⁸³ thereby rendering it unprotectible. A review of the marketing theme example cases discussed above, however, reveals that a properly defined radio format is more than a mere marketing theme. 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 protectible radio format, broadcasters should carefully articulate specific, highly unique and original elements that, in concert with one another, create a source-significant

Reviewing the two retail trade dress cases discussed above is similarly helpful in determining the metes and bounds 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 seeking to attract the same target audience, since there are a number of competitive options – perhaps an infinite number – that are available to competitors. Radio stations must define

¹⁸³ See *supra* part III.A.3.

with specificity the elements that comprise its format, because, as the *Best Cellars* court noted, the proper inquiry when considering the protectibility of trade dress is the “combination that a customer would perceive,”¹⁸⁴ but those individual elements need not be individually protectible. 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 elements generic and thus 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”),¹⁸⁵ when 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.¹⁸⁶

CMM had developed a direct mail based marketing campaign for radio stations that took the form of an employment theme, entitled the “Payroll Payoff.”¹⁸⁷ CMM’s

¹⁸⁴ *Best Cellars*, 320 F. Supp. 2d at 72.

¹⁸⁵ *CMM Cable Rep., Inc. v. Ocean Coast Props.*, 888 F. Supp. 192 (D. Me. 1995).

¹⁸⁶ *Id.* at 195.

¹⁸⁷ *Id.*

business involved licensing such promotions to radio stations throughout the country on a market exclusive basis, that is, the promotion was available to only one radio station in a particular market.¹⁸⁸ Because of prior business dealings with a competitor to 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.¹⁸⁹ CMM sued WPOR primarily alleging copyright and trademark infringement, 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.¹⁹⁰ Of particular interest here, however, was CMM’s claim of trade dress infringement, asserting that it had protectible trade dress in “the employment concept, graphics, layout and look of Payroll Payoff”¹⁹¹ and the “graphics, layout, and look” of the promotion.¹⁹²

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.”¹⁹³ In considering the “graphics, layout, and look”¹⁹⁴ 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’

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 194.

¹⁹¹ *Id.* at 202.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

while CMM's features a boot, lariat, and lots of green cash.”¹⁹⁵ As the district court opinion was on a motion for summary judgment, the court assumed that CMM had established distinctiveness and non-functionality sufficient to warrant protection as trade dress.¹⁹⁶ The court then separated out the functional aspects from the nonfunctional aspects of the two promotions¹⁹⁷ 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.”¹⁹⁸ Although the case eventually reached the Court of Appeals for the First Circuit, the trade dress issue received only a fleeting reference, because “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.”¹⁹⁹ 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.”²⁰⁰

3. An Applied Example

The application of trade dress protection to a radio format is perhaps best illustrated by way of an example. Consider a radio station format with the following characteristics:²⁰¹

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 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 protectibility of the individual elements, but instead the distinctiveness, functionality, and commercial impact of the entire trade dress. *See, e.g.,* Milstein, 58 F.3d at 32-33.

¹⁹⁸ *Id.*

¹⁹⁹ *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1527 (1st Cir. 1996)

²⁰⁰ *Id.*

²⁰¹ 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.

- A unique and unconventional name for a radio station: Express 105. The name is a federally registered trademark for radio broadcasting services.²⁰²
- A logo which 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, its sound (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 present day.
- Tempo is calculated 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.

²⁰² The registrability of radio station names and frequency designators is an issue that is separate and distinct from the trade dress issues discussed presently. *See generally* MCCARTHY, *supra* note 65, § 7:17; *see also* Christopher S. Reed, *Zoning Out on Radio: Trademark Registration for Broadcast Brands*, GERMESHAUSEN CENTER NEWSLETTER, Winter/Spring 2005, at 5.

- 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 are ever longer than 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 characteristics combined constitute the station's format, and when considered together, constitute protectible trade dress.

Certain elements of the format are clearly protectible under various other intellectual property theories, such as the logo and certain manifestations of the color scheme which are likely copyrightable, or the name Express 105 which 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 protectible as trade secrets, provided they are properly protected and not readily discernable by third parties. Other characteristics of the format are simply unprotectible, such as the fact the station speeds up its music slightly, or the average tempo of a typical hour of music.

The hypothetical Express 105 format is almost certainly more than a mere marketing theme because the list of elements that comprise it constitute a “precise expression of the character and scope of the claimed trade dress”²⁰³ thereby allowing a court to “evaluate how unique and unexpected the [] elements are in the relevant market.”²⁰⁴ Additionally, the articulated elements of the format are more than a mere “combination and refinement of commonly used elements”²⁰⁵ in other radio formats, but rather a precise and specifically configured arrangement of programming features and tactics designed to attract a particular audience and serves to identify a specific radio station – the fictitious Express 105.

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 court held that while Abercrombie & Fitch’s catalog featured certain functional elements, those elements alone did “not make the catalog’s overall design functional.”²⁰⁶ Indeed, there, as here, even though certain elements may serve some functional purpose, the unique selection and “arrangement of

²⁰³ *Landscape Forms*, 113 F.3d at 381.

²⁰⁴ *Id.*

²⁰⁵ *Miracle Blade*, 207 F. Supp. 2d at 1153.

²⁰⁶ *Abercrombie II*, 280 F.3d at 644.

these features can constitute more than the sum of its non-protectable parts.”²⁰⁷ Further, under either the comparable alternatives test or the effective competition test,²⁰⁸ the Express 105 format would be determined to be nonfunctional because 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 to compete, since there are in infinite number of formats that a station might adopt, both in general terms and in terms of attracting a specific target demographically defined audience.

IV. Conclusion

Over the past ten years, the radio industry has been changed dramatically. What was once thought to be a dying industry has recently seen new life, as new technologies have given rise to a bigger and more competitive market for radio and radio-like programming, rather than killing the market that existed previously. With these new competitive pressures and targeted programming models has come a need to better secure the intellectual assets that comprise modern broadcast programming strategies against 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 whole radio formats.

Although the theory has yet to be tested by the courts, through a creative application of trade dress law, 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

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 642.

of a particular programming model. By requiring those asserting protection to demonstrate 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 endeavor to 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.