

# INGRID & ISABEL, LLC v. BABY BE MINE, LLC

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*A California Court has found that the 'look and feel' of a website is protectable trade dress and suggests nuances for pleading and maintaining the claim, in a decision that marks the emergence of a new field of law.*

Trade dress protects the overall look of a product or its packaging, as distinct from any individual parts. Imagine a Jack Daniels bottle without the word 'Jack Daniels.' Or a Hershey's bar without the name 'Hershey's.' Because of the 'trade dress' of these products—their shape, colouring, size, and placement of text—consumers can identify them even if they are stripped of their names. And while courts have recognised trade dress protection in connection with the design of books and magazines, the décor of restaurants, and on packaging, whether the 'look and feel' of a website is protectable is an emerging field of law.

Most recently, in *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, a federal court in the Northern District of California held that the 'look and feel' of a website may constitute a protectable trade dress. In *Ingrid & Isabel*, plaintiffs Ingrid & Isabel, LLC ('I&I') and defendants Baby Be Mine, LLC ('BBM') were companies selling maternity clothes. In April 2013, I&I

sued BBM claiming, among other things, that BBM had copied the 'look and feel' of its website in violation of trade mark and unfair competition laws. In support of its trade dress claims, I&I alleged similarities in font, style, format, and colour of the websites. I&I also offered facts showing that BBM had intentionally copied I&I's website. BBM moved for summary judgment on all claims, arguing that there were no facts supporting 'inherent distinctiveness, secondary meaning, or likelihood of confusion,' as required under the Lanham Act.

On 1 October 2014, the court denied BBM's motions for summary judgment. In so doing, the court held that the 'look and feel' of a website may constitute protectable trade dress, and that I&I had raised triable issues of fact (that is, issues that a jury would need to decide) as to whether BBM had infringed on its trade dress. The court raised two distinctions in pleading and maintaining a claim for trade dress infringement with respect to the 'look and feel' of a website.

First, the *Ingrid* court echoed other California district courts in stating that a plaintiff must plead trade dress claims with particularity. This requires that a plaintiff do more than just list out a website's component

parts when describing the protected trade dress. In support, the court first cited *Salt Optics, Inc. v. Jand*, where a federal court in the Central District of California dismissed plaintiff's 'look and feel' claim for failure to state a claim. In that case, plaintiff and defendant were both in the business of selling eyewear. The plaintiff alleged that the defendant intentionally copied its website design. In its complaint, the plaintiff listed seven aspects of the website that the defendant had allegedly mimicked: (1) the 'saltwater blue' text offset against black and grey text; (2) the background borders; (3) the way the plaintiff presented eyewear; (4) the use of models; (5) a magnification tool; (6) the ability of consumers to see a pair of glasses in a close-up photo with a small inset of the model wearing glasses; and (7) the company logo in the upper left-hand corner of the screen. The court held that the plaintiff failed to state a claim for trade dress infringement. The court explained that a mere cataloguing of a website's features, without synthesizing the elements to describe how they constitute the website's 'look and feel', do not give defendants adequate notice of the claim.

The *Ingrid* court also referenced *Sleep Science Partners v. Lieberman*, a case in which another court in the Northern District of California required more from a plaintiff pleading trade dress infringement. In that case, the court held that the plaintiff failed to state a trade dress claim when it catalogued several components of its website without articulating which elements constituted its trade dress. The court wrote that the plaintiff had also suggested that these components

were 'only some among many,' indicating it might redefine its trade dress later in the litigation. The court thus dismissed the plaintiff's complaint for failure to give adequate notice of the trade dress claim.

Looking at these cases, the court in *Ingrid* considered whether I&I had adequately described the 'look and feel' of its website. I&I listed several similarities between its website and BBM's website, including the location of the logo, the colour of the logo, the fonts used throughout the website, the patterns and colours of the wallpaper, and the look of the models pictured on the site. The court found that I&I's allegations were more specific than the allegations dismissed in *Sleep Science and Jand*; however like *Sleep Science*, I&I alleged that the elements were only 'some among many.' Ultimately, the court considered BBM's motion for summary judgment without ruling on whether I&I's trade dress allegations had been pled with the requisite particularity required by *Salt Optics and Sleep Science*.

Around the same time that *Ingrid* was decided, a Southern California federal court rejected the particularity standard adopted in *Ingrid*. In *Lepton Labs, LLC v. Walker*, the court examined a trade dress claim similar to that in *Sleep Science*. The plaintiff in *Lepton*, when describing its trade dress, had also provided a mere catalogue of the elements constituting trade dress. But the court found this list sufficient to survive a motion to dismiss. The court stated that it could not require a plaintiff to prove all of the essential elements claim at the pleading stage, and the legal merits of the trade dress claim must

be addressed at summary judgment when the parties provide all relevant, admissible evidence.

The second nuance noted by the *Ingrid* court concerns the elements of the claim itself. Trade dress claims often turn on whether the 'look and feel' of the product, website, or packaging has (1) acquired 'secondary meaning' and is (2) 'non-functional.' Additionally, assuming a plaintiff can establish these elements, it must also prove that (3) the defendant's product, website, or packaging—that is, the rival 'trade dress'—is likely to create consumer confusion.

The defendants in *Ingrid* claimed that I&I could not establish prong one—secondary meaning or inherent distinctiveness. They argued that nothing about the website was inherently distinctive, because elements such as patterned wallpapers, pregnant female models and handwritten logos are common in the maternity marketplace. The court agreed, suggesting that the 'look and feel' of a website could never be inherently distinctive. The defendants also argued that the website had no secondary meaning. Secondary meaning is the mental association by consumers between the alleged mark and the source of the product. It can be established in three ways: (1) through an expert survey of purchasers; (2) through circumstantial evidence such as exclusivity, manner, and length of use, amount and manner of advertising, amount of sales and the number of customers, and the plaintiff's established place in the market; or (3) by showing that defendants had intentionally copied the 'look and feel' of the plaintiff's site. In *Ingrid*, there was no expert survey.

And circumstantial evidence was insufficient to show an ‘established place in the market,’ as the website was merely three years old. But, the *Ingrid* court did find secondary meaning based on I&I’s allegations that BBM had intentionally copied its trade dress.

In finding a triable issue of fact as to secondary meaning, the *Ingrid* court considered both the similarities between the two parties’ websites and all evidence of intentional copying. I&I had offered evidence that BBM had told vendors that it would like its website’s design to emulate I&I’s website, particularly its ‘clean contemporary look’ and ‘background.’ This coupled with the substantial similarity between the look of the websites was sufficient to establish prong one.

BBM also argued that I&I could not establish prong three—that

there was a likelihood of confusion. In the Ninth Circuit, the test for likelihood of confusion is whether a reasonably prudent consumer would be confused as to the origin of the service by observing the trade dress. Traditionally, courts have assessed eight factors in assessment: (1) strength of the mark; (2) proximity or relatedness of the goods; (3) similarity of sight, sound and meaning; (4) evidence of actual confusion; (5) marketing channels; (6) type of goods and purchaser care; (7) intent; and (8) likelihood of expansion.

Applying these standards, BBM claimed that because the consumer must type in the URL to get to a site, and because the BBM and I&I’s URLs were distinct, a reasonable consumer could not confuse the two pages. Further, BBM contended that I&I had not shown any surveys supporting actual confusion. The court rejected

this argument. The court held that there were triable issues of fact as to: (1) strength of the mark; (2) proximity or relatedness of the goods; (3) similarity of sight, sound and meaning; (5) marketing channels; and (7) intent. The court did not proffer facts supporting each factor, but again found it sufficient that I&I had alleged evidence of copying and the actual similarity of the websites to create a triable issue of fact as to consumer confusion.

Thus, at least one court has found that intentional copying of a website, resulting in a similar ‘look and feel,’ may be sufficient to raise a triable issue of fact for a jury to decide. Trade dress protection has existed for decades, but it will be interesting to follow how courts continue to apply the law to websites, mobile apps, and other non-traditional mediums.

