

A UNIQUE BOTTLE DESIGN CAN BE PROTECTED

By David Hoffman



According to the Wine Market Council, fifty seven percent of all wine consumed on site is by women. Over half of the wine consumption in the U.S. is by women. According to an article by Marti Barletta posted at www.adage.com, "Marketing Wines To Women," February 7, 2006, women shop for wine with the final experience in mind. Perhaps armed with that knowledge, Lushious LLC of Yorktown Heights, New York applied for a design patent on a wine bottle shaped somewhat like a women's leg in a high heel shoe. And the U.S. Patent Office issued Patent No. D703,543 on April 29, 2014 on the design, shown left: *U.S. Patent No. D703,543 issued on April 29, 2014 to Lushious LLC.*



What does this design patent mean for the competition? In essence, a design patent means no one can make, use, sell or offer for sale a product that to the "ordinary observer" looks so similar to the patented design that the observer would be deceived, inducing the purchase of the imitation supposing it to be the patented product. *Gorham Co. v. White*, 81 U.S. 511 (1871).

The term of a design patent is fifteen years. After that, the design is dedicated to the public, except that there still may be trademark protection. This type of trademark protection, in the

shape of the packaging (the bottle is arguably packaging for wine), is called "trade dress." Everyone is familiar with the Coke® bottle's hour glass shape. One of Coke's many trade dress registrations on bottles is shown right:

U.S. Trademark Registration No. 2,155,915 owned by Coca-Cola Company.



What is the difference between trade dress protection and a design patent? Trade dress protection requires that consumers recognize the shape of the bottle as indicating a particular source of the goods. In the case of Coke®, there is no doubt that almost all consumers recognize the shape as indicating Coke®. In the case of the Lushious high heeled shoe bottle above, it does not appear to be on sale yet or possibly has only very limited sales. Therefore, there is no consumer recognition yet.



Others in the wine industry have sought protection on unique bottles. Recently, the U.S. Trademark Office issued a registration to Tosti SPA Corporation of Italy.

U.S. Trademark Registration No. 4,510,337 owned by Tosti SPA Corporation the actual bottle is to the left.

The registration is not on the bottle per se, but just the “navel” (indentation) in its center.

Another interesting bottle design (and trademark too) is the bottle for “ANOTHER !@#% MERLOT! (in a very cool Bottle)” made by Bridgeview Vineyards, Inc. in Oregon. The bottle has an angled bottom, and therefore leans like that tower in Pisa:



Leaning merlot bottle side by side with leaning tower of Pisa. It does not appear that Bridgeview registered this design, but Bridgeview does have a few registrations on trade dress including the below:

U.S. Trademark Registration No. 2,393,703 owned by Bridgeview Vineyards, Inc. the actual bottle is to the right above.

Creating and using a unique bottle design can be expensive. Protecting the investment in such a design makes a lot of sense. A unique bottle shape may be protected by trade dress or design patent or both. If there is consumer recognition, trade dress protection will exist. If there is no consumer recognition yet, filing for a design patent may make sense for protection in the early years of sales.

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David Hoffman has been an attorney practicing exclusively in intellectual property law (patents, trademarks, copyrights and unfair competition) since 1985. Mr. Hoffman represents multinational companies as well as numerous start up to medium size businesses. He both litigates and procures rights for his clients, and with his philosophy of procuring the broadest rights possible, performing good clearance procedures, and negotiating, has successfully avoided and minimized litigation for clients he counsels.



Mr. Hoffman has taught for a patent bar review class, has authored articles and given lectures on intellectual property, and has been named to Who's Who Millennium Edition and Who's Who Among Rising Young Americans in American Society & Business.



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