



# THINK FORWARD

## Ann Arbor Attorney Looks At Unusual Trademarking Trends In Context Of World IP Day On April 26

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Ann Arbor, Mich. - The world celebrates intellectual property because IP puts a value on inventions, literary and artistic works and name brands and logos that move commerce, create wealth and make a distinctive mark. As cerebral as it may sound though, intellectual property has a fun side, too. With the celebration of [World IP Day](#) on April 26, Michael N. Spink, a shareholder in the Ann Arbor office of Brinks Gilson & Lione, one of the nation's largest intellectual property law firms, looks at a growing area of intellectual property: unusual trademarks such as sound, scent, texture, motion and color combinations.

"It's estimated that individuals encounter more than 1,000 trademarks daily, but those tend to be more traditional "branding" trademarks. What I'm particularly interested in noting is the growth of non-traditional trademarks," Spink said.

Spink, who blogs and tweets [@funkymarksblog](#), recently used the NCAA basketball tournament in March to show how college athletics are upping the game in registering their school's sports trademarks. While they didn't get too far in the actual tournament, the University of Arkansas Razorbacks won the trademark tourney, with 119 federal trademark registrations. Interestingly, they are also one of a few universities who have a registered sound trademark (*sound mark*), WOO PIG SOOIE, a chant used by the university and its fans in the famous "[Calling the Hogs](#)."

Also in the sound mark category, the Alpha Kappa Alpha Sorority Inc. recently trademarked its high pitched "[Skee Wee](#)" sound, used by the organization since 1941 as both a greeting and organization identifier. A new addition to trademark protected scent registrations is that of [PLAY-DOH](#) by the toy company, Hasbro.

Spink notes that while most types of non-traditional marks are registerable in the U.S., they can be more difficult to register than traditional marks, mainly due to the requirement that non-traditional marks be distinctive and non-functional.

"The first hurdle is that all trademarks must be distinctive, which means they must be capable of distinguishing the owner's goods from those of others; however, certain non-traditional marks such as product configuration, color, scent, flavor and some sound marks can never be inherently distinctive," said Spink. "In these cases, secondary meaning, which is distinctiveness acquired through consumer recognition, must be shown for registration on the Principal Register, which is the primary register of trademarks maintained by the United States Patent and Trademark Office (USPTO)."

When non-traditional marks are merely appealing aspects of a product, or simply inherent features, they can only be registered on the principal register with proof of secondary meaning. For example, the sound emitted by a device in its normal course of operation requires secondary meaning to be accepted for trademark consideration.

Even when a non-traditional mark is sufficiently distinctive, the functionality doctrine may present a barrier to trademark registration. The functionality doctrine prevents the owner from limiting competition by trademarking a useful product feature to extend patent-like protection. Generally, the question asked by the Trademark Office is whether aspects of the design are essential to the use or purpose of the article, or affect the cost or quality of the article.

"If a shape of a product enables it to operate, or improves on another design in some way (i.e. cheaper, faster, lighter, stronger), then it cannot be trademarked," said Spink. "Similarly, if a particular color makes a device more visible in an industry where visibility is desired, it cannot be trademarked."

Product packaging is still the most common type of non-traditional trademark registered in the U.S., followed by product configuration, sound and color. What's next on the trademark horizon?

"Scent, texture and flavor trademarks, while increasing, are still fairly rare in the U.S., but I expect that to change over the next five to ten years," said Spink.

Spink has previously written about [trademark protection for collegiate color combinations](#), as well as compared the trademarks of two of Michigan's top college rivals: Michigan State University and the University of Michigan (Hail to the Victors – the hands down winner!)

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