## 15.7 Infringement—Elements and Burden of Proof—Trade Dress

## (15 U.S.C. § 1125(a)(1))

On the plaintiff’s claim for trade dress infringement, the plaintiff has the burden of proving by a preponderance of the evidence each of the following elements:

First, [*describe the plaintiff’s trade dress*] is distinctive;

Second, the plaintiff owns [*describe the plaintiff’s trade dress*] as trade dress;

Third, the [*describe the plaintiff’s trade dress*] is nonfunctional; and

Fourth, the defendant used [*describe trade dress used by the defendant*] [trade dress similar to [*describe the plaintiff’s trade dress*]] without the consent of the plaintiff in a manner that is likely to cause confusion among ordinary consumers as to the source, sponsorship, affiliation, or approval of the [plaintiff’s] [defendant’s] goods.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

**Comment**

To provide the jury further guidance on the first element of this instruction (distinctiveness), use Instruction 15.9 (Infringement—Elements—Validity—Unregistered Marks), Instruction 15.10 (Infringement–Elements—Validity—Unregistered Marks—Distinctiveness) (*see* the Comment to that instruction on Modifications for Trade Dress cases), and 15.11 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning). If the trade dress is registered, use Instruction 15.8 (Infringement—Elements—Presumed Validity and Ownership—Registered Trademark). For an instruction providing guidance on the third element of this instruction, *see* Instruction 15.12 (Infringement—Elements—Validity—Trade Dress—Non–Functionality Requirement). For an instruction covering the fourth element of this instruction, *see* Instruction 15.18 (Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test).

*See Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 808 (9th Cir. 2003) (“Generally, to recover for trade dress infringement under [15 U.S.C.] § 1125, a plaintiff must show that ‘its trade dress is protectable and that defendant’s use of the same or similar trade dress is likely to confuse consumers.’ A trade dress is protectable if it is ‘nonfunctional and has acquired secondary meaning and if its imitation creates a likelihood of consumer confusion.’”) (citations omitted); *Talking Rain Beverage Co. Inc. v. S. Beach Beverage Co.,* 349 F.3d 601, 603 (9th Cir. 2003) (citing as elements of proof necessary to show infringement of bottle design: “(1) nonfunctionality, (2) distinctiveness and (3) likelihood of confusion”).

“In trademark cases, it is not necessary for plaintiff to prove actual damage or injury to state a prima facie case of infringement. Injunctive relief does not require that injury be proven. . . . All that must be proven to establish liability and the need for an injunction against infringement is the likelihood of confusion. ” 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 30:2.50 (5th ed. 2019).

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