

A Phonaesthetic Theory of Trademark Functionality

Xiyin Tang

The doctrine of "aesthetic functionality" stems from the prohibition on "functional" marks in the Lanham Act, and was developed as a means of fostering competition and prohibiting a monopolist from claiming perpetual protection over a design element that consumers find inherently pleasing and that its competitors should have access to. As one court put it, aesthetic functionality renders unprotectable certain design elements that satisfy consumers' tastes for beauty.

The prohibition against functional marks as applied to word marks, on the other hand, has been relegated to words that convey a "functional" message: "Fragile" or "Open here" cannot be trademarked. Thus, functionality as applied to word marks have been applied only in the most quotidian, literal sense. But words and phrases, like designs, can also be beautiful and have inherent aesthetic value. This paper incorporates the study of phonaesthetics (the study of inherently pleasing words and phrases) to argue that a third type of word mark—marks that are inherently pleasing in sound—should also be deemed inherently pleasing, and thus, "functional" and unprotectable. Taking certain examples from phonaesthetics and the broader study of phonology, a phonaesthetically functional argument could be made, for example, for those marks containing phrasal alliteration, linear motifs, or parallel syntactic features. More broadly, this paper's examination of those trademarks for which additional value is derived from the word's inherent phonological beauty addresses the recent trend of trademarking, for example, song lyrics—those that more properly belong to the realm of copyright, not trademark, law.