

## Is your trade dress and décor protected by trademark laws?



Scott N. Opincar | Monday, December 31, 2018

A Nov. 14, 2018, decision by Judge Christopher Boyko of the U.S. District Court for the Northern District of Ohio in *Barrio Bros., LLC, et al., v. Revolution, LLC, et al.*, highlights the importance of knowing the difference between legally protected distinctive trade secrets and unprotected designs and décor that are generally in the public domain.

### What is trade dress?

Trade dress consists of the unique, non-functional, elements used to promote a product or service. It may also include features such as size, shape, color, color combinations, textures, graphics, or even particular sales techniques. Federal law is violated when someone uses a trade dress (or trade mark) of another that creates confusion among customers. While a trademark prevents others from copying the name of the good or service, trade dress prevents copying the appearance.

### *Barrio Bros., LLC, et al., v. Revolution, LLC, et al*

Cleveland-based Barrio sued Columbus' Condado Tacos charging misappropriation of trade secrets and breach of contract, among other claims. The lawsuit alleged that Condado wrongfully mimicked Barrio's dining and entertainment experience by copying Barrio's "Day of the Dead" theme, and by using similar serving concepts such as patrons creating their own tacos from a checklist of ingredients and by foil-wrapping tacos in a basket served with a plastic fork. Condado asserted that Barrio's name, trade dress, and serving style concepts were not distinctive to Barrio and therefore were not legally protected trade secrets.

### Trade dress infringement law

Section 43(a) of the Lanham Act creates a "federal cause of action for infringement of marks and trade dress that have not obtained federal registration." To succeed on a trade dress infringement claim under the Lanham Act, a plaintiff must prove:

1. That the trade dress in question is distinctive in the marketplace, thereby indicating the source of the good it dresses.
2. That the trade dress is primarily nonfunctional.
3. That the trade dress of the competing good is confusingly similar.

Trade dress is inherently distinctive when its intrinsic nature serves to identify a particular source of the product rather than the product itself. Trade dress that is merely descriptive or generic is not inherently distinctive.

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Courts ruling on this issue have held that trade dress is the overall look of the store, consisting of a combination of interacting elements, and competitors do not infringe by appropriating the marketing concepts or any particular element of a restaurant's design, unless the overall dress is sufficiently similar to generate likely consumer confusion. Thus, while a competitor's décor may copy some elements of another's, this alone will not constitute trade dress infringement.

### **The Court's Decision**

Judge Boyko held that Barrio's trade dress failed to demonstrate a distinctive, protectable trade dress and that Barrio's alleged distinctive design elements were non-distinctive, functional, and not confusingly similar to those of Condado.

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