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## ZAG-S&W INTELLECTUAL PROPERTY CLIENT ADVISORY

# Protect Your Website's Look and Feel from Copycats

A website's distinctive appearance, layout, and design qualities—its “look and feel”—are often the most important tools through which a company can make a first impression on consumers and effectively market its brand. Now, according to one federal court, companies can use trademark law to protect the unique look and feel of their websites from imitators. As a result of this ruling, companies should consider registering their websites as trademarks with the U.S. Patent and Trademark Office (the “USPTO”).

## THE INGRID & ISABEL RULING

In *Ingrid & Isabel, Inc. v. Baby Be Mine, LLC*, No. 13-01806 (N.D. Cal. Oct. 1, 2014), the U.S. District Court for the Northern District of California recently ruled that the look and feel of a website used to market and sell products and services can constitute protectable trade dress under Section 43 of the Lanham Act. See 15 U.S.C. § 1125(a) (2012). Trade dress, a derivative of trademark law, protects the total image of a business or product, including the arrangement of identifying features such as graphics, packaging, designs, shapes, colors, textures, and décor.

Here, the plaintiff, Ingrid & Isabel, Inc. (“I&I”), and the defendant, Baby Be Mine, LLC (“BBM”), operated competing retail websites specializing in maternity clothing. I&I alleged that BBM had intentionally copied, in an attempt to imitate I&I, many specific characteristics of I&I's website, including:

- the use of a logo in a “feminine script in pastel pink-orange hue”;
- photographs of models posed in similar positions, “featured from head to mid-thigh, wearing white tanks with jeans, with long naturally wavy hair”; and
- the colors, patterns, fonts, and wallpaper used throughout I&I's website.

The court first determined that I&I adequately stated a claim for trade dress infringement by identifying elements of its website that, taken together, could comprise protectable trade dress. Instead of presenting a general description, I&I cited specific components of its website's design. In the court's view, I&I's allegations of similarity were more specific than those raised by plaintiffs in previous cases in which courts have rejected website “look-and-feel” claims.

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See, e.g., *Bryant v. Matvieshen*, 904 F. Supp. 2d 1034, 1046 (E.D. Cal. 2012) (“In order to state a trade dress claim for website design, [a plaintiff] needs to clearly define the specific elements that constitute the trade dress; a general description of the site is insufficient.”); *Salt Optics, Inc. v. Jand*, 2010 WL 4961702, at \*5 (C.D. Cal. Nov. 19, 2010) (“[M]ere cataloguing of a website’s features does not give defendants adequate notice of a plaintiff’s trade dress claim.”). As a result, the court found that these elements viewed as a whole could constitute protectable trade dress.

Next, the court held that I&I’s allegations met the legal requirements of a trade dress claim. The court applied the three-part test for trade dress infringement, examining whether: (1) I&I’s trade dress was inherently distinctive or had acquired secondary meaning; (2) I&I’s website’s elements were non-functional; and (3) BBM’s website created a likelihood of consumer confusion. Ultimately, the court held that BBM’s intentional copying of I&I’s non-functional design choices on its website was sufficient to create a triable issue of fact as to the elements of I&I’s trade dress claim, and denied BBM’s motion for summary judgment.

## **FINALLY, COURTS HAVE CAUGHT UP WITH THE TIMES**

This case represents a significant step forward for companies looking to protect their brands’ goodwill online. For the first time, a court has recognized that a website’s design can serve an important brand-identifying purpose worthy of trademark protection even though the website is not the product itself, but rather a marketplace in which products and services are offered and sold.

Previous case law suggested that a website could constitute protectable trade dress only if the website itself was the product. See *Conference Archives, Inc. v. Sound Images, Inc.*, No. 06-00076, 2010 WL 1626072 (W.D. Pa. Mar. 31, 2010) (describing the plaintiff’s website as a computer program that “display[ed] recorded video in a webpage within an Internet browser”). Courts had called the idea of protecting the trade dress of other websites a “novel legal theory,” but had not ruled on the issue. *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240, 1246 (W.D. Wash. 2007).

With the *Ingrid & Isabel* ruling, the law seems to have caught up with the times, giving the trade dress of online stores the same protection as that for physical stores. For example, in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992), the U.S. Supreme Court ruled that a Mexican restaurant’s distinctive décor was entitled to trade dress protection. More recently, the USPTO allowed Apple, Inc. to register a trademark for the design and layout of its unique retail stores. Now, in *Ingrid & Isabel*, a court has finally recognized that the look and feel of a website—a virtual store—can be a protectable form of intellectual property. This is particularly important in today’s economy, as this year sales in U.S. online stores are expected to top \$300 billion.

## **INGRID AND ISABEL AND YOU: HOW TO PROTECT YOUR WEBSITE’S TRADE DRESS**

As *Ingrid & Isabel* demonstrates, a “trademarked look” is not just a popular saying. Using trademark law, companies that rely on the look and feel of their websites to identify their brands may be able to protect their deliberate design choices from copycats. Of course, it remains to be seen whether other courts across the country will adopt this standard. Nevertheless, in the interim, online-only companies wishing to seek registration of website trade dress should create and consistently use a distinctive look and feel for their websites to distinguish themselves from competitors and to develop strong brand identities. This sort of consistent branding may help lay the foundation for online trade dress protection and may discourage others from copying.

The case is *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, case number 13-cv-01806-JCS, in the U.S. District Court for the Northern District of California.