

TRADE DRESS PROTECTION ON THE OVERALL APPEARANCE OF STORES IN THAILAND^{*}

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Received 17 June 19

Revised 17 August 19

Accepted 28 November 19

Abstract

The overall appearance of stores has become a crucial factor for the business nowadays. Consequently, the company must not want any competitor to copy the successful stores' appearance easily. However, there is no specific provision in order to protect the overall appearance of stores in Thailand. Because of this problem, this article applies a comparative study to examine how other countries i.e. the United States, Germany and Republic of Korea protects the overall appearance of stores in order to find the best solution for Thailand. The analysis shows that although the overall appearance of stores plays a role as same as trademark does, it does not fall into the definition of the mark under the Trademark Act of Thailand. Therefore, the owner cannot exploit any benefits or rights provided under the act. Accordingly, it is important to amend the relevant provisions of Trademark Act of Thailand in order to cover the protections of the overall appearance of stores.

Keywords: Intellectual Property, Trade Dress, Trademark, Overall Appearance of Stores

^{*} This article is summarized and rearranged from the thesis "Trade Dress Protection on the Overall Appearance of Stores in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

1. Introduction

To be a successful business nowadays, the improvement of the quality of products and services alone is not sufficiently effective. The remarkable presentation that products or services are shown to customers is also essential. Therefore, the business must create a variety of strategies in order to attract consumers and defeat other competitors. Apart from a design of product packaging or products configuration, an overall design or environment of the places in which the products and services are presented and provided is an efficient method. The overall appearance of stores refers to exterior, interior, decoration, or atmospheric such as sound, aroma or lighting, and including the manner of services and sale techniques¹ which is legally recognized in the United States (“U.S.”) as ‘trade dress.’

One of the purposes of designing outstanding stores is to attract consumers and enhance sales.² The better experiences they get, the stronger they desire in spending more money.³ More importantly, a significant purpose for investing in developing remarkable business places is to promote brand awareness. It can be said that the appearance of stores plays the same role as a business trademark, a brand identifier. Consequently, unique stores are essential for the recognition of the brand. In other words, the noticeable stores can distinguish one business from others who present the same category of products or services.

Because of these important factors, the business, therefore, put a great effort into developing the overall appearance of stores. A lot of surveys and research shall be conducted, and a huge amount of investment shall be put in order to serve customer satisfaction and create the recognition of the brand identity to the visitors. By investing a big amount

¹ Steven W Kopp and Jeff Langender ‘Protecting Appearance and Atmospherics: Trade Dress as a Component of Retail Strategy’ (Journal of Public Policy & Marketing, 2014) 33(1) 34

² *ibid*, 35

³ Erica J Weiner and Monica Richman, ‘Trade Dress Protection for Retail Store Design’ (2014) 32 *Acc Docket* 100

of money, putting a lot of effort and times, the businesses deserve protection for their endeavor.

In Thailand, currently, Intellectual Property (“IP”) laws can partially protect the overall appearance of stores. The copyright protects the architecture works such as interior or exterior design. However, it does not cover all elements of stores’ trade dress such as the manner of services or atmosphere of stores. Furthermore, although trade dress functions for identifying the source of the product or service as similar to the feature of trademark, trade dress protection is limited by the strict definition of trademark that only the defined article can be registered and protected. Alternative speaking, Thai Trademark Act does not include the overall appearance of stores as the subject-matter of trademark.

Because of the lack of protection and explicit law, it, therefore, gives an opportunity to the offenders in easily seizing and imitating the well-known stores’ design. In 2017, Japanese news reported that Thai restaurant had imitated ICHIRAN Japanese Ramen restaurant in various aspects such as a recipe, dining table design, materials used for providing service and shop system which could together be constituted as the overall appearance of stores or trade dress of stores.⁴ Nevertheless, the Department of Intellectual Property of Thailand (“DIP”) informed that such overall appearance could not be protected under the current IP laws of Thailand because of the absent of the law relating to trade dress.⁵ Therefore, the owner of the

⁴ Boss Mar Eang! Jang Pom Ron Ram Ramenthai Lork Korsorb Ramen Yeepun Mar Tang Doon [‘Boss comes! Explain the issue regarding Thai ramen restaurant copy the whole Japanese Ramen Restaurant’] *Thairath* (Bangkok, 13 December 2017) (‘บอสมาเอง! แจงปมร้าน ร้านราเมงไทย ลอกข้อสอบ ‘ราเมงญี่ปุ่น’ มาทั้งดุ้น’ *ไทยรัฐ* (กรุงเทพฯ, 13 2560)) <<https://www.thairath.co.th/content/1151655>> accessed 4 November 2018

⁵ Krom Sapsin Thang Panya Yan Ramen ICHIRAN Tontamrab Perd Sakar Nai Thai Dai [‘Department of Intellectual Property confirm the original ramen restaurant can open in Thailand’] *Thai PBS* (Bangkok, 13 December 2017) (‘กรมทรัพย์สินทางปัญญา ยันราเมงอิชิรันต้นตำรับ เปิดสาขาในไทยได้’ *ไทยพีบีเอส* (กรุงเทพฯ, 13 ธันวาคม 2560)) <<https://news.thaipbs.or.th/content/268483>> accessed 11 October 2018

Japanese restaurant cannot gain any protection on the overall appearance of its restaurant in Thailand.

This imitation causes problems to the existing stores' owners and consumers. Firstly, it does not serve a fair competition to the business. The business should have a right to use their own distinctively creative stores exclusively and monopoly. This affects both Thai and foreign operators. That is, the Thai business would be discouraged to design new creative stores as the protection is unreliable. Furthermore, the foreign business is the most target of stores to be copied which would eventually block the foreign investment in Thailand.

Secondly, it also affects the consumers in misunderstanding the origin of products and services. The consumers should have a right to consume products or services from the source that they actually intend to. From such Japanese restaurant example, the consumers might mislead that the ramen restaurant in Thailand is the same origin from Japan.

Thirdly, it affects trade competition in widespread as has been said; the business owners are discouraged in creating any new design because of the piracy which eventually results in the poor competitive situation of the society.

More importantly, from the absence of a specific law in relation to trade dress protection on the overall appearance of stores and the most relevant law which is trademark, in particular, cannot adequately serve the protection, the law should be amended to protect the overall appearance of stores in order to hinder the aforementioned problems.

2. General Concepts of Trade Dress and the Overall Appearance of Stores

In order to clearly understand the background of protection over the overall appearance of stores, it is essential to understand the general concepts of trade dress and the overall appearance of stores.

2.1 Trade Dress

Trade dress is one category of Intellectual Property Rights, under the umbrella of trademark that protects the total image or the overall appearance of products or services. The common trade dress for a product is packaging or labeling while the commercial enterprise is the design and decoration of stores.

The U.S. is a country that first developed this concept⁶, and even though trade dress term is mentioned in the Lanham Act or Trademark Act, the specific definition is silent and is not specified in any other laws. The U.S. Court had gradually developed trade dress term since the nineteenth century. It was firstly used for packaging of products and further expanded to other types of trade dress such as label or product configuration.⁷ Trade dress is a total look that includes size, shape, color or color combinations, texture or graphics.⁸ Consequently, the term has been broadly interpreted to cover the overall appearance of places providing services such as retail stores which comprise of exterior or interior design, decorations, sales techniques or manner of services.⁹

The total image or overall appearance that is registrable trade dress has to meet certain criteria as follows:

2.1.1 Distinctiveness

Trade dress plays the same role as trademark in the sense that they have the main feature for identifying the source of products or services. Either trade dress or trademark can be protected only in the case that such dress or mark is distinctive.

⁶ Shilpa Chaudhury, 'Trade Dress Protection: Comparative Analysis Between USA and India' (*academia*)

⁷ William E Levin, *Trade Dress Protection* (2nd edn, Clark Boardman Callaghan 2016) s 1:5

⁸ *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 973 (11th Cir.1983)

⁹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992)

In other words, the dress or mark must be able to distinguish products and services from other sources. The distinctiveness is considered of the dress, not the products and services themselves, that whether it can identify and differentiate the source or not. It can be easily said that when one walks along the street and can recognize 7-eleven, the convenient store only by seeing three colors i.e. orange, green and red which are using to be a light exterior decoration without seeing the name of the store.

Distinctiveness can be acquired in two ways. The first way is inherent distinctiveness. It emerges since the creation of certain trademark or trade dress of products or services or being distinctive by itself. It is simply that the mark or dress itself almost automatically tells consumers that certain mark or dress refers to a certain brand. Alternatively, although trade dress is not distinctive by itself, it can acquire by second way which are the distinctiveness by recognition and the length of use of such dress with certain products and services. It also can be called ‘secondary meaning’. It can be said that although the distinctiveness of certain dress is absent, by proving the use of trade dress, such trade dress can become distinctive in another meaning of reputation and long use.¹⁰

2.1.2 Non-functionality

To consider the functionality doctrine under trade dress, it has to be non-functional and shall remain aware that it is the test of products or services ‘appearance’ not the products or services themselves. The rationale of non-functionality requirement is to avoid a certain manufacturer or service provider from creating unfair competition.¹¹ The laws need to remain the state of competition to the market for the functional features of products or services and let the businesses only compete with the design or

¹⁰ What Tingsamitr, *Kruangmhai Kam Kar [Trademark Law]* (1st edn, Nititham 2002) (วัศ ดิงสมิตร, *เครื่องหมายการค้า* (พิมพ์ครั้งที่ 1, นิติธรรม 2545)) 10-11

¹¹ Alessandro Bianchi, ‘Trade dress infringement found in restaurant decoration’ (Lexology, 19 April 2011) <<https://www.lexology.com/library/detail.aspx?g=369a02b3-7dec-4afd-b581-ddfd87eedb75>> accessed 31 May 2018

appearance.¹² Furthermore, it is to avoid the extension of the protection period of patent. As the functionality of products is currently protectable under patent law, however, it is limited to a short period of time before falling to the public domain as the government needs the technology to be developed or to promote inventive creation. Trade dress or trademark serves the other perspective and is renewably protected. If the state allows any functional products to be further eternally protected by seeking in trade dress or trademark, it would obstruct the growth of technology and block the trade competition with a monopoly situation which would contrast with patent law.

The question to the test is whether trade dress is for only uniquely identifying the products or services or whether it relates to consumers expectation. Trade dress has to have a feature only for distinguishing the source of products or services or shows a connection between products or services with the brand. It can be shown by a design of slogan, logo, shape or a combination of those or any feature that is ornamental.¹³ By considering this factor, it has to be considered as a whole of trade dress whether it is functional. In other words, it is irrelevant if each component is individually functional, but the overall trade dress is non-functional.¹⁴

2.2 Overall Appearance of Stores

The overall appearance of stores is one of the crucial factors of a successful business because it is the main channel that the retailers communicate to the consumers and represents the brand. In the retail industry nowadays, the quality of the goods or services alone are not sufficient but how they are presented and provided to the consumers are another key success factor. Thus, the design of stores is essential. The good

¹² Levin (n 7) s 17:1

¹³ 'Trade Dress: Everything You Need to Know' (*Upcounsel*)

<<https://www.upcounsel.com/trade-dress>> accessed 1 June 2018

¹⁴ Charles Lee Israel Slamowitz 'Adjusting the Dress Code: Implementing Trade Dress Reform to Burgeon User Experience (UX) Protections' (2017) 41 Colum. J.L. & Arts 99

design stores that are capable of providing an impressive experience to the consumers are not only attracted more visitors but also reflect the good reputation to the brand and, at the same time, raising brand loyalty. More importantly, the strong brand identity which is shown by the store design can boost up the brand awareness which simultaneously functions as a distinguisher of a particular brand from another.

In order to design a certain store, the important element to be considered in order to meet explained purposes is a theme of stores. Basically, the theme would present the brand and corporate identity and create the environment harmoniously through the overall appearance of stores. Thus, the customers will experience the stores with the same emotion for all touch points and can link back to the brand origin without getting lost.¹⁵

Furthermore, other elements such as exterior and interior design are also be considered.¹⁶ The exterior design is the first impression that the customers would decide to enter the stores and also a major tool for differentiating each store. It can be designed on the architecture work, such as building, storefront or fixture, sign or logo, or window display.¹⁷

The interior design relates to how the products are stored and how the products and services are presented to the customers. It shall conform to the corporate and store identity. The interior can be designed on decoration, lighting, color or music background.¹⁸

¹⁵ Alexandra Sheehan, '8 Ways to Incorporate Brand Identity Into Your Retail Store' (Shopify, 15 February 2017) <<https://www.shopify.com/retail/8-ways-to-bring-brand-identity-to-life-in-your-retail-store>> accessed 4 November 2018

¹⁶ Supanne Inkaew, Kam Boriham Kam Kar Pleek [Retailing Management] (2st edn, Tanapress 2010) (สุพรรณณี อินทร์แก้ว, การบริหารการค้าปลีก (พิมพ์ครั้งที่ 2, ธนาเพรส 2553)) 106-114

¹⁷ ibid.

¹⁸ Tony Kent and Ogenyi Omar, *Retailing* (Palgrave Macmillan 2003)

3. Protection on the Overall Appearance of Stores in Thailand

Thailand does not have any explicitly law that wholly provides protection to the overall appearance of stores. Even copyright that mentioned about the protection on a ‘work of architecture’, it still does not serve the characteristic of the overall appearance of stores and the purpose of overall appearance of stores protection.

However, trademark is the legal approach that best suits the overall appearance of stores. It is because of the main features of trademark, and the feature of stores design is consistent. The duration of protection that is renewable, therefore, serve the purpose of it. Nevertheless, the current Trademark Act of Thailand does not protect the overall appearance of stores.

There are several problems regarding the protection on the overall appearance of stores which can be elaborated as follows:

3.1 Strict of Definition of Mark

‘Mark means a photograph, drawing, invented device, logo, name, word, phrase, letter, numeral, signature, combination of colors, figurative element, sound or combination thereof.’

The above definition of mark as defined in Section 4 of Trademark Act B.E. 2534 (1991) (as amended up to Trademark Act (No. 3) B.E. 2559 (2015) (“**Trademark Act**”) is limited. Section 4 provides a definition by using the word “mean”, therefore, the article that can be protected under the act is strictly listed to the article and any further interpretation cannot be made.

Historically, the ‘mark’ is defined in section 3 of Trademark Act B.E. 2474 (1931). This act had been enacted by following English law.¹⁹ The mark

¹⁹ Ratinuch Kawnachaimongkol, ‘Pan Har Kodmhai Nai Karn Hai Kwam Khumkrong Kae Kruangkhai Karn Kar Nai Rooprang Roopthrong Kong Watthu’ [‘Legal Protection for Figurative Elements as a Trademark’] (Master Degree Thesis, Thammasat University 2002) (รติณัฐ ก้าวหน้าชัยมงคล, ‘ปัญหากฎหมายในการให้ความคุ้มครองแก่เครื่องหมายการค้าในรูปร่างรูปทรงของวัตถุ’ (วิทยานิพนธ์ปริญญาโท, มหาวิทยาลัยธรรมศาสตร์ 2545))

‘includes’ photograph, logo, address, label, named ticket, signature, word, letter, number or any combination thereof. It is seen that the articles listed are only what the law intended to cover which could enlarge to other articles by using the term ‘includes’. In other words, the definition of mark, at that time, does not limit the article to be only the listed item.

However, in that time, the law was interpreted to include the figurative element or configuration which made the overlapped protection with the ‘product design’ of patent. This overlapping caused the consequent problems to patent protection. The patent law has a limited period of protection in order to encourage people to continuously developed new work. Trademark, on the other hand, is renewable. The business operator, therefore, used trademark as a loophole for expanding period of protection of their product design instead of using patent which provide only a limited period of protection. Consequently, the definition of mark was amended.²⁰

In 1991, Trademark Act was amended, and the definition of mark is strictly defined in Section 4. Consequently, the article protected under Trademark Act is limited. Thus, the overall appearance of stores is not included in the definition of mark, although it plays a role as same as trademark does which is the ability to distinguish the products and services. However, it still not a ‘mark’ under this act. Any protection or right under this act, therefore, cannot apply to the overall appearance of stores.

In other countries, i.e., the U.S.²¹ and Germany²², provide a definition of trademark broadly by using the term ‘include’. This might leave an open space for further interpretation and allow other to be interpreted as trademark in the next future.

The characteristic of overall appearance of stores basically is the overall theme which is presented by design on the exterior or interior design

²⁰ *ibid.*

²¹ The Lanham Act 15 U.S.C. 1127 (U.S.), s 45

²² German Trademark Act (Markengesetz) (GER), s 3

and design layout which comprises with various elements such as furniture, decoration, signage, choice of colors, light or sound. It is the combination of visually perceptible and non-visually perceptible. Thus, it can be seen that the overall appearance of stores ‘wholly’ does not fall into the definition of mark. Therefore, the overall appearance of stores is not a mark subject to this definition. If the store's owners would like to seek for protection under Trademark Act, the owner has to separately register in particular parts such as logo or words that individually play a role as trademark and service mark.

In order to expand the definition to cover the overall appearance of stores, the writer deems that the law should be amended by adjusting the use of word ‘means’ to be ‘includes’ in order to not limiting the definition of mark. This is to open a space for the court to further interpret the term ‘mark’ to suit upcoming circumstances. However, it is not necessary to include all types of trade dress as it would be too strict, which would not conform to the rapid growth of the technology.

If the law is amended to cover the overall appearance of stores it will open the space for the owner of the stores design to exploit the rights and protection provided in Trademark Act.

3.2 Characteristic of Distinctiveness

The strict definition of mark is not the only problem that makes the overall appearance of stores not protected. In the case that the definition of mark has solved and covered the overall appearance of stores, it still has to meet the requirement of distinctiveness.

The distinctiveness under Trademark Act can be acquired in two ways, which are inherent distinctiveness and the length of the use. The focused issue is on the inherent distinctiveness.

According to Section 7 paragraph one of Trademark Act, the distinctive trademark refers to ‘trademark that enables the public or consumers to distinguish the goods with which the trademark is used from other goods’. This is the general criteria for considering inherent distinctiveness. Thus, if the overall appearance of stores meets the

characteristic of inherent distinctiveness provided in Section 7 paragraph one, it is sufficient to acquire inherent distinctiveness.

Furthermore, the characteristic listed in Section 7 paragraph two (1) to (11) is a presumption for inherently distinctive mark. In the item listed, there is no any item that is or can be interpreted to meet the characteristic of the overall appearance of stores. When considering the inherent distinctiveness of the overall appearance of stores, the general criteria in Section 7 paragraph one shall be applied.

In order to consider the inherent distinctiveness according to Section 7 paragraph one, there is the guideline for considering inherent distinctiveness that is prescribed in the Manual for Examination of Trademark Office Registrar B.E. 2559 (2016). The manual explains the mark that is not distinctive according to Section 7 paragraph one which is elaborated as follows:²³

1. Mark that is a common phrase such as Treat the Condition Transform the Life, Natural Defense 2-Way Powder Foundation.
2. Mark that is a common word, for example words that mean international, guaranty or a word that describe the series of products such as Nano, Eco, Green, Nseries, Nine Million.
3. Mark that is commonly used in commerce.

However, as has been seen, such guideline is quite broad and contain just a limited example. Furthermore, it is designed for only the traditional mark (such as words or phrases). Thus, it may not be suitable to consider the inherent distinctiveness of the overall appearance of stores.

The proof of inherent distinctiveness of the overall appearance of stores might not be easy because the overall appearance of stores is different from the traditional trademark that is visual perception and a straight-forward mark. On the other hand, the overall appearance of stores

²³ Khumue Naewthang Karn Pidcharana Sangkarn Khong Naitabien Samnak Kruangmhai Karn Kar [Manual for Examination of Trademark Office Registrar 2016] (Trademark Office, Department of Intellectual Property 2016) (คู่มือแนวทางการพิจารณาสั่งการของนายทะเบียน สำนักเครื่องหมายการค้า พ.ศ. 2559 (สำนักเครื่องหมายการค้า, กรมทรัพย์สินทางปัญญา 2559))

combines with many elements that may or may not be separately distinctive and are visual or non-visual perception. Therefore, it is the challenge of the owner of store design to show the registrar that the certain store appearance is capable of distinguishing the products or services provided in that stores from other stores. Alternatively, it is also challenging for the registrar to consider the distinctiveness of stores if the guidance is inadequate.

In the case that the exterior appearance of store is totally new, it will not be that challenging because the exterior appearance is clearly distinctive. However, for the case that the stores combine with many common elements to incorporate the store, it may be difficult to examine the inherent distinctiveness. Therefore, a clear guideline for the registrar is essential.

3.3 Functionality Element

In Trademark Act the element of functionality is absent. The elements of functionality are crucial because they can remain trade competition and prevent the misuse of trade dress.

Many of the overall appearances of stores incorporate with the functional features. For example, the restaurant has food prep area, counter or ringing bell for waiter and waitress. Those features are a necessity and serve for the utilitarian purpose, which other restaurants could also have the same feature. Trademark protection is to provide an exclusive right to use to the owner; therefore, if the functional features are protected under trademark approach, it means that other restaurants cannot use the same feature. This would block the trade competition. The protection of trade dress should not hinder the other businesses to enter the market. Therefore, the functional feature should not be protected and leave the competitor compete for only the design of the stores to create the source identifier according to the main purpose of trade dress.

Furthermore, the open space of trademark for functional feature may open an opportunity for the applicant to apply the expired patent

through trademark approach. As has been said, inevitably, most of stores have some stuff that is for a utilitarian purpose. Thus, it may be doubtful that some element may already be protected or is capable for acquiring protection under patent approach which an overlapped protection would occur. As the invention under patent is protected for only a limited period of time, trademark may be misused for the patent owner to expand the period of protection by using trademark that can be forever protected. This is not fair because the purpose of trademark and trade dress is created to be a source identifier, while patent protects the technology invention. Although the separate feature is functional and essential to the use, trade dress is considered the 'overall' elements that incorporated just to be a source identifier, not the separate features. Therefore, to avoid the doubtfulness and the misuse of trade dress, the non-functionality requirement is essential.

To be summarized, trademark is the suitable legal approach to provide protection to the overall appearance of stores as it functions to be a source identifier as same as trademark. However, it cannot currently be protected under Trademark Act because the strict definition of mark which does not cover the overall appearance of stores. Apart from that, the examination guideline for determining the characteristic of distinctiveness provided under Trademark Act is too broad and cannot apply with the character of the overall appearance of stores. Moreover, there might be a doubt of whether the protection of the overall appearance of stores would be overlapped with the patent law and would hinder the competition.

To protect the overall appearance of stores would hinder the misleading consumers as it helps to identify the brand origin of stores. Furthermore, it is a fair reward for the business operator who conducts research and invests considerable money in order to create one store. Moreover, it also encourages foreign investors to enter to Thai market as there is legal security assuring the protection on the overall appearance of stores of their companies.

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