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Fluid marks 2.0: Protecting a dynamic brand

Many companies now adopt variable brand identities to communicate with consumers. **Lisa Pearson** offers practical tips on using and protecting fluid trade marks

Since Managing IP published my article *How Fluid Trade Marks Can Enhance Your Brand* in May 2008, this then-incipient trend has taken the branding world by storm, stoked by social media and technological advances. Fluid marks often take on their own personalities, not unlike a celebrity endorser or character who speaks for the brand. In her new book *Dynamic Identities, How to Create a Living Brand*, graphic designer Irene van Nes explains:

Fifty years ago, a brand was just a single mark used for brand recognition, which set it apart from the rest. Now a brand has become a platform where like-minded people come together, and an experience that creates emotional attachment. Brands need to constantly adapt to their fast-changing environment in order to survive. Internet, social media and technical revolutions have given brands the opportunity to behave like living organisms.

Consistency and repetition may be desirable attributes under trade mark law, but those qualities rarely enliven conversation or vitalise relationships. For this reason, Jose Martinez Salmeron, executive creative director for the international agency Ogilvy & Mahler, provocatively, and persuasively, argues: “If you love your brand, set it free.” According to his February article by that name in *Smashing Magazine*:

Brands should give themselves permission to be more surprising, to flirt with their customers, to listen to what they have to say and to cater to their desires. A modern brand should take leaps of faith, abandon self-obsessions and embrace risk.

If your brand fails to do so, he warns, it “could become irrelevant in a hurry”.

Today’s branding professionals, and the public at large, have enthusiastically embraced fluid marks. And IP law (and lawyers) will just have to adapt or they, too, could become irrelevant in a hurry.

What is a fluid mark?

Even if you have never heard of a fluid mark, you have probably encountered them in the marketplace. They range from the ever-changing “doodles” on Google’s home page to the borzoi dog colophons on Alfred A Knopf books. Picture the artistic renditions of the Absolut vodka bottle that have graced the brand’s advertisements for decades, the mutable Chiquita banana sticker (this morning, mine read: “Apply sticker to forehead. Smile™” and I smiled). MTV. AOL. The list goes on.

All of these brands have exchanged static marks in favor of more dynamic presentations.

Of course, even conventional trade marks are not carved in stone. Most brand owners periodically update their logos. They may employ different variants of their logos for different product lines. They may adopt moving image, sound or color marks. To my way of thinking, none of these qualifies as a fluid mark if the brand owner’s intent is to use the same mark, in the same format, for an extended period of time. Still, the lessons learned from these more familiar scenarios provide some guidance in wrangling a fluid mark from a trade mark law perspective.

A taxonomy in progress

Over the past five years, examples of fluid marks have proliferated. To advance the legal analysis and advise clients in this largely uncharted territory, it can be useful to visualise a taxonomy of different species of fluid marks. The figure opposite is my stab at it.

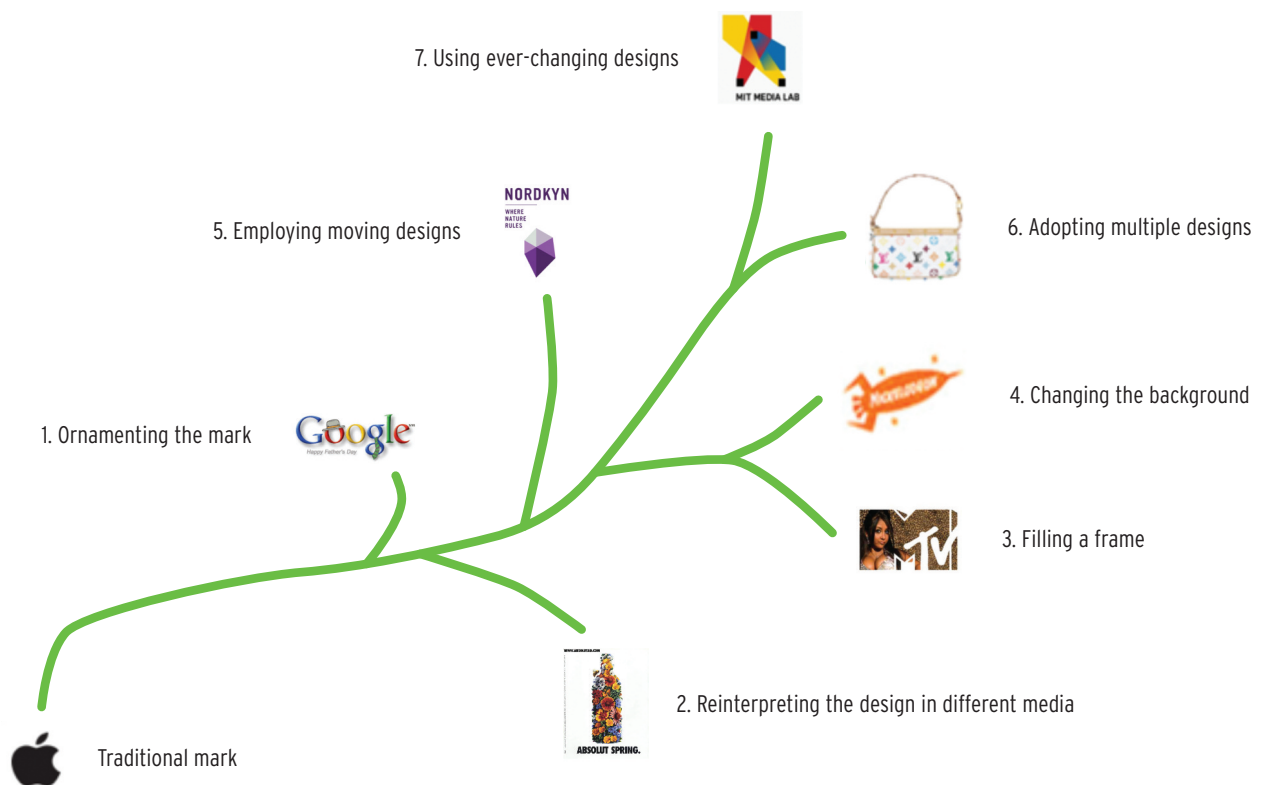
Some fluid marks are hybrids, exhibiting characteristics of more than one

One-minute read



As they strive to humanise their brands and keep them relevant, brand owners are challenging trade mark fundamentals by rejecting static source identifiers and adopting fluid marks that change frequently - sometimes constantly. Logos increasingly function as brand ambassadors rather than mere signatures to engage consumers. Trade dress escapes the confines of products and packaging, becoming ever more instrumental in brand identification. The key to retaining trade mark protection is to focus on the source-identifying pillars of a brand and strive to keep them consistent

A taxonomy of fluid marks



species. And given the fertile minds of creative professionals, it is inevitable that new species of fluid marks have been, or will soon be, discovered.

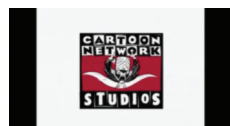
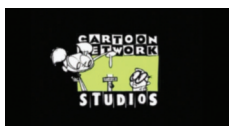
Let's take a closer look at some fluid marks that exemplify each of these species and the trade mark law issues they raise.

Ornamenting the mark

Google, the quintessential information-age brand, has used the bully pulpit of its home page to present its famous mark in countless variations representing virtually every known fluid mark species. But when Google first introduced its “doodles” as a regular feature in 2000, Google doodlers typically retained most of the basic elements of the Google word mark or logo and added ornamentation, as shown in the variants below.



Similarly, in a moving image example, Cartoon Networks Studios routinely animated its old logo by splicing in new footage of its characters.



In these examples, the essential characteristics of the mark remain constant but new matter has been added, typically for a limited period of time.

While their trade mark lawyers may not like it, many brand owners ornament or partially obscure their marks from time to time. Packaging designers gussy up products for seasonal campaigns. Magazine art directors invade their mastheads with their cover art. To minimise the legal risks of embellishing their marks in this manner, brand owners would be wise to focus on:

- 1) Ensuring that the template for the fluid mark – the word or design mark, or both – is a strong, distinctive mark and registered as a mark.
- 2) Displaying the template in its registered form frequently.
- 3) Obscuring as little of the mark as possible.
- 4) Clearing new matter to ensure it does not infringe someone else's rights and to see whether the new matter itself qualifies for some form of IP protection (most likely copyright).
- 5) Assessing the context and physical location in which the mark is displayed. Google, for example, enjoys a home page advantage, in that visitors to Google.com readily associate the fluid variants populating the same spot on its home page with Google as the source – even when the template is hidden in a Jackson Pollock homage or shown in Morse Code.

Reinterpreting the mark in different media

Another common way to energise a mark is to reinterpret it in different media, as Absolut has with its vodka bottle and *The New York Times* with its T magazine logo. NYC's Museum of Arts and Design, for example, wanted a logo that "seemed inventive and surprising, and that could appear in different ways on different occasions" because "[t]he Museum, after all, is dedicated to artists who take typical forms – say, vessels, or chairs – and transform them over and over again", according to its design firm Pentagram, which proffered the following solution:



In the UK, Channel 4's station identification spots have long recast its logo in different media, and used Channel 4's own medium (television) to animate it.



As long as the contours of the mark remain constant, this approach is quite similar to the common practice of presenting a mark in different colors and raises similar legal concerns. Obviously, Tiffany & Co would compromise the strength of its distinctive color mark if it failed to use the same hue of blue consistently. Similarly, reinterpreting the mark in media can weaken or destroy trade dress rights in any branding indicia that have been jettisoned.

Consider the charming and original brand identity created by Edhv for De Buitenwereld, a restaurant in a beautiful natural setting in the Netherlands. It employs stop action photography to show different seeds (grass, basil, radish) growing into a living logotype. If reinterpreted in other, inert materials, this identity would lose a vital ingredient. Where the medium itself is a source-identifying element of the mark, it would be sensible to forego reinterpreting the mark in different media and consider alternative approaches to fluidity.

In other situations, reinterpreting the mark in different media can actually bolster trade dress rights, particularly where the brand owner seeks to develop recognition for a distinctive logotype, shape or form. The Absolut campaign was a brilliant way to develop the outline of the vodka bottle as a strong source identifier (so strong, in fact, that it was profiled in the book *Absolut: Biography of a Bottle* and two dedicated art books).

The take-aways are that, before adopting a fluid mark of any species:

- 1) Identify the distinctive, source-identifying elements of the mark that serve as pillars of the brand (word mark, typography, logo, colour, sensory elements such as graphics or sounds, or quirky characteristics).
- 2) Strive to keep those pillars constant, although you don't necessarily have to employ every pillar every time the mark appears.
- 3) Wherever possible, protect those pillars by registering them for trade mark, copyright, design or patent protection and using the appropriate legends or notices.

- 4) Consider whether it is necessary to register variants of the mark. Registration may not be legally or financially feasible, and the cost may outweigh the benefit. In jurisdictions like the United States that do not require trade mark or copyright registration to establish protectable rights, brand owners may choose to forgo the advantages of registration and rely on this safety net alone for the new matter in their different iterations.

Filling a frame

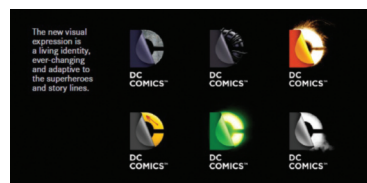
Closely related to reinterpreting the mark in different media, filling a frame is probably the most popular way to implement a fluid brand identity. What characterises this species is a frame or three-dimensional container displaying different content in the same medium. By way of illustration, MTV recently adopted a new logo to reflect the fact that it no longer offers just music television. It now fills the contours of the MTV logo with photographic images of its stars and content (presumably, after clearing all necessary rights).



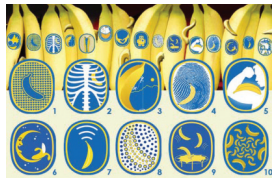
Melbourne, Australia branded itself as a destination city with another logo template incorporating a distinctive M. The Landor firm designed this new identity to be as "as multifaceted as the city itself: creative, cultural, sustainable. A celebration of diversity and personal interpretation that is both future-proof and iconic", according to the firm.



And DC Comics also recently selected a transformative logo system based on its monogram and designed by Landor, which explains that the letter D, placed over the letter C, "peels back, reflecting the dual identities and depths of personality that are at the core of the characters".



These examples all employ logotypes as the frame, but this approach can also work with a strong trade dress element. For example, in the US, at least, Chiquita Brands has developed strong consumer recognition for the iconic blue and yellow stickers on its bananas and, over 20 years ago, had the foresight to secure a US trade mark registration for its ovular sticker design (without words), which is now incontestable. In 2010, Chiquita deployed an interactive website and social media platforms to stage a contest challenging consumers to create new sticker designs for its bananas. Here are the winners chosen by a popular vote:



Chiquita kept its brand relevant by trading top-down brand consistency for crowd-sourced brand variety. It encouraged consumers to make the brand their own. And, assuming it secured proper transfers of rights or consents from contestants, Chiquita made a lot of people smile with no apparent damage to its trade mark rights.

Changing the background

The flip side to filling a frame is changing the background. The following two examples demonstrate how to do it really well, and how to do it even better.

Children of all ages were desolate when the television network Nickelodeon retired its shape-shifting orange “splat” logo, shown below.



According to the Fred/Alan Agency, which takes credit for developing this concept way back in 1984: “Movement was the way to go, constant change made for an energetic network, and kids were the most vital force in the world. Give them something they relate to: change.... [O]range generally clashed with everything and that would make the logo stand out.... The splat could morph into any image we liked.”

This early fluid branding initiative successfully capitalised on Nickelodeon’s strong word mark and signature colour, took full advantage of the television medium with moving image variants, and led to the creation of one of the most entertaining trade mark style guides ever. Just one quibble: Nickelodeon could have presented its word mark in consistent typography without sacrificing any of the fun.

AOL adopted a fluid identity of the same species when it split away from parent Time-Warner in 2009. With the aim of communicating its newly articulated mission to inform, entertain and connect the world with more original content than its competitors, AOL chose a new invisible logo mark, in which the mark appears as negative space juxtaposed against different content.



Wolf Olins, the design firm, described its first set of AOL logo variants as a starter set, with the idea that the background content could come from any source, including users eager to create their own customised AOL logos. AOL’s home page now permits users to customise their screens with their favorite logo art.

According to AOL, though, “it’s not about it being 1000 logos ... it’s a consistent wordmark that’s consistent and clean”. In fact, AOL’s fluid branding presents as constant pillars both a word mark and a particular design presentation of that word mark, thereby building recognition for and rights in two brand pillars despite the changing background scenery. A lesson learned.

Employing moving designs

There is a new species of fluid mark in which technologicaly enabled moving images replace conventional logos. They differ from the moving image clips that are registrable as trade marks in the US because they change all of the time rather than featuring consistent content with a fixed beginning and end.

One beautiful example of a fluid moving design is the spinning icon designed for Visit Nordkyn, a tourist site for two Norwegian municipalities “as far North as you can go on Europe’s mainland”. Neue Design Studio developed two trade mark assets: the tagline “Where nature rules” and a faceted logo form that changes when the wind or temperature changes.



The website visitnordkyn.com automatically updates the logo every five minutes based on a feed of weather statistics from the Norwegian Meteorological Institutes.

Ollo, which offers wireless internet in emerging markets, quite literally permits users to play with its mark. Taking good advantage of new multi-touch technology and custom software, Ollo encourages users to entertain themselves by manipulating the logo on their smartphones and tablets.



According to its creators, Ollo’s flexible branding system has the potential to create “an infinite number of digital assets.”

The trade dress of these two moving logos certainly seems distinctive and strong enough to warrant protection. But, it would be a nightmare to try to register these moving logos as such under the current US trade mark rules; it is hard enough to register a straightforward moving image mark that doesn’t mutate. This is one area where it would make good sense to re-examine the rules.

In the meantime, assuming the fluid moving logo will be in widespread use in the US, the best bet would be to rely upon common law trade mark rights, unfair competition and the broad prohibitions of section 43(a) of the Lanham Act, which protects unregistered source identifiers against uses likely to create confusion, mistake or deception. US copyright law (for original artwork, animations or software) or patent law (for novel technological inventions) might also provide some measure of protection.

Adopting multiple designs

In some cases, fluidity can be achieved by owning a relatively small nuclear family of design marks. For example, Louis Vuitton has recast its classic LV toile monogram in new presentations created by designer Marc Jacobs and artist Takashi Murakami, and a number of these new variant patterns, such as the cherry-strewn and multicoloured designs, have become so popular that they, too, function as traditional trade marks in their own right. What may have started out as an example of ornamenting a mark has now become a valuable portfolio of LV marks.

Because the variants are relatively few in number, and because their owner has a deep pocket book, Louis Vuitton could register each separate variant as a trade mark to shore up its protection.

This strategy could also work for other brand owners who use a small family of marks to effectuate their dynamic brand identities. For example, the Casa di Musica in Porto, Portugal has a series of logos inspired by different views of its unique modern building designed by architect Rem Koolhaas, which it also recasts in different colors:

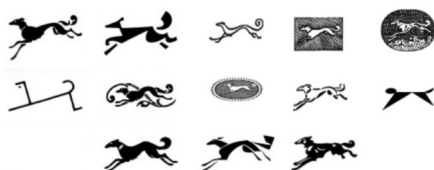


For fluid mark initiatives based upon a manageable number of design variants, it is worthwhile to consider registering each different logo as a separate mark, which would provide better protection than registering the family as a group or a single family member. Also note that both the Louis Vuitton and Casa di Musica marks include copyrightable subject matter contributed by well-known creators, underscoring the need to obtain a consent or, even better, a work-for-hire agreement or transfer of rights in any such contributions.

Using ever-changing designs

The real brain teasers for IP lawyers are trade marks that constantly change. In addition to the Ollo moving design discussed above, consider the following old and new media exemplars.

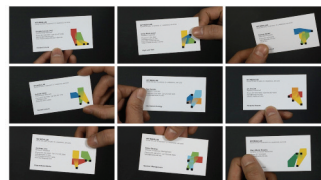
I read my fair share of Knopf books before realising that its borzoi colophon is a fluid mark: “For every single kind of book Knopf publishes, it seems we have a matching borzoi: minimalist borzois, ornate borzois, borzois with toques. We never get tired of looking through all of them,” Knopf says.



Venerable Saks Fifth Avenue adopted an award-winning branding initiative that transforms its classic script logo into a striking new graphic image that can be reshuffled endlessly like the ultimate jumble square game.



And MIT Media Lab permits each of its constituents to create his or her own signature logo:



According to the designers Pentagram, “[t]he new visual identity of the MIT Media Lab is inspired by the community it comprises: Highly creative people from all kinds of backgrounds come together, inspire each other and collaboratively develop a vision of the future....The logo is based on a visual system, an algorithm that produces a unique logo for each person, for faculty, staff and students.”

Perhaps Knopf could enhance its legal position by registering Borzoi as a word mark and taking the position that its design marks are the visual equivalents. Perhaps Saks could register the different graphics on, say, three different-size shopping bags as separate marks, and claim protection for a family of marks. Perhaps MIT Media Lab could obtain a colour mark registration for the colour elements of its visual identity if it did not try to capture the rainbow.

None of these suggestions provides a perfect solution. As trade dress becomes ever more important as a brand identifier, we simply need to come up with some better ways to protect it and, in the meantime, do the best we can with trade mark law and other available IP protection.

Bolster brand pillars

The design blog Zeroside offers this compelling insight: Designing a fluid identity can help bring that needed awareness to an organization, but it shouldn’t be a gimmick at heart. This way of thinking about identity design only works when it’s an outgrowth of the brand’s distinctive DNA. ... Some brands might need to show diversity of service or product, while others see flexibility as a crucial competitive advantage, and other organizations have evolution written into their foundations.

From a legal perspective, fluid trade marks can be as hard to corral as mercury. A brand owner who presents a weak mark in myriad presentations runs the risk of diluting it or making it generic. One who fails to use a mark risks abandoning it. And one who flits from one presentation of a mark to another misses the opportunity to build consumer recognition and enforceable trade mark rights in more components of “the brand’s distinctive DNA”. For these reasons, brand owners and their counsel must consider the pillars of the brand and take precautions not to undermine them.



Lisa Pearson

© Lisa Pearson 2013. Pearson is a partner at Kilpatrick Townsend & Stockton in New York. She gratefully acknowledges the assistance of graphic specialist Nita Gray