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A Franchising Conundrum: The Disconnect Between Recognizing, Claiming, and Enforcing Trade Dress Rights

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"It has been more than 25 years since the Supreme Court decided *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). Therein, the Court found trade dress consisting of the following to be protectable and infringed:

> A festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the out-side patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme.

In so holding, the Court held that a claim of trade dress infringement requires proof of three elements: (1) the trade dress is primarily nonfunctional; (2) the trade dress is inherently distinctive or has acquired a secondary meaning; and (3) the alleged infringement creates a likelihood of confusion. It also noted that protection of trade dress is no different than protection of any other source indicating designation."

Related People



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