



**By James Conley**

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Using Brand Identity to Reinforce Market Value

# THE COMPETITIVE EDGE

In this issue of *Innovation*, we gain insight from contemporary thought leaders on the meaning of “great” design. I personally like the wisdom offered by Rudolf Arnheim in his seminal text *Art and Visual Perception: A Psychology of the Creative Eye*. This classic describes the process that takes place when people create and/or experience the visual arts and explains how the eye organizes visual material according to psychological laws.



In the contemporary design lexicon, the book is a guide to how designers can influence the cognitive visual touch-points of the user experience. Each of the book's 10 chapters has a compelling, simple title, such as Shape, Color, Movement, Dynamics—degrees of freedom influenced, if not completely controlled, by the designer. Arnheim's unique contribution is his reconciliation of visual perception dimensions with the laws of psychology.

Independent of how we define great design, it is axiomatic that successful innovations based on great designs will be emulated and in some cases boldly copied without regard for the intellectual property of the innovator. Such is the plight of the uninformed designer in a global market where critical design knowledge (in digital form) can be transferred at the speed of light to competitors and low-cost fast followers. Cost-based competition usually follows the knowledge transfer, quickly eroding the market advantages and profit margins associated with the original design.

The use of the robin's-egg blue on boxes, package wrappings, shopping bags and even catalogs is the monopoly right of Tiffany & Co. (with four separate registered trademarks).

This conundrum is not unique to the design profession, nor is it today's news. Inventors and creative professionals in developed economies have struggled with the challenges of innovation appropriation throughout modern history. With the advance of a global market, however, the world has become flatter than ever. According to the contemporary oracle Alan Greenspan, the future basis of economic competition is knowledge-based differentiation and management of the associated intellectual property rights. Hence, if our designs and the associated user experiences are great and truly distinctive, designers need to know how to secure the intellectual property rights and leverage the imbedded optionality.

At the Kellogg School of Management's Center for Research on Technology & Innovation, we study how contemporary firms use innovation and design to build and sustain competitive advantage. Of particular interest is the premeditated tactical and strategic use of specific intellectual property regimes (patents, marks, secrets and copyrights) in a time-sequenced manner.

Our findings overwhelmingly support the conventional wisdom that design decisions cast a big shadow on a product's commercial success over its life cycle. We also found that some firms know how to build brand identity through great design and how to leverage/secure critical design elements and cognitive touch-points of the user experience through nontraditional marks. In the process, they build strong, transferable brand identity that can be leveraged in future offerings.

### Making Your Mark

Nontraditional marks are not simply static graphical embodiments. Over the last 15 years, these registrations have evolved to become primitive design elements such as color, product shape and configuration, dynamic motion, sound and even scent, mirroring all aspects of human perception. (Note that many of these design elements begin to sound like the chapter titles in Arnheim's book.)

If used properly, marks, unlike patents or copyrights, never expire. Registered design elements that serve as a brand foundation are therefore indefinite forms of com-

Registered Nov. 16, 1943

Trade-Mark 404,248

Republished, under the Act of 1946, April 27, 1948, by Levi Strauss &amp; Company, San Francisco, Calif.

Affidavit under Section 8 accepted.

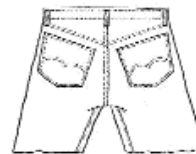
Affidavit under Section 15 received, Aug. 31, 1955.

## UNITED STATES PATENT OFFICE

Levi Strauss &amp; Company, San Francisco, Calif.

Act of February 20, 1905

Application September 23, 1942, Serial No. 452,703



### STATEMENT

To the Commission of Patents:

Levi Strauss & Company, a corporation duly organized under the laws of the State of California and located at the city and county of San Francisco, California, and doing business there, San Francisco, California, I used the trade-mark shown in the accompanying drawing as my mark.

See WELSHMAN'S Ed. in Class 20, Clothing, and in five instances likewise the design used by other persons known to me to be used by the said Levi Strauss & Company, in San Francisco, California, in or about February 20, 1905. The said design is my own and I apply to it as my own, and I apply to it as my own.

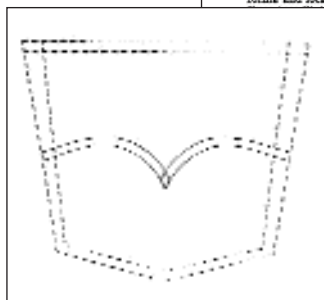
The trade-mark consists of design of orange color displayed on the back of the overall as shown on the mark as applied to the overall

by stitching the double garment design on the hip pocket, with orange colored thread, or by painting the lines of said design on the hip pocket with orange-colored paint.

The design is made to the exclusive use of the proprietorship of a pair of overalls.

This trademark is a pair of overalls; and I declare, under penalty of perjury, that I am the proprietor of said design, and I have no knowledge of any other person who has used or who is using said design, in violation of the provisions of the Act of February 20, 1905, as amended, with full power of substitution and amendment, and I am authorized to make alterations and amendments therein, to execute the certificate of registration, and to transact all business in the Patent Office connected therewith.

LEVI STRAUSS & COMPANY,  
By DANIEL M. KOGELAND,  
Vice President.



Levi Strauss has registered the overall shape and layout of the backside of a pair of jeans and separately registered the unique stitching pattern on their pockets.

petitive advantage. This has led us to consider the possibility that the cognitive touch-points of the user experience can be reconciled and secured or monopolized as identifiable brand elements through nontraditional marks.

### Research That Began at Home

The motivation for this research began at home. Almost every year since 1998 my wife and I have been blessed by the birth of a healthy child. Coincident with each birth is the arrival of a baby gift from a wonderful friend. The gift comes in a box, wrapped in paper and tucked into a fancy shopping bag—all of the same robin's-egg blue. My wife's response to the arrival of this uniquely packaged baby present is one of sheer joy.

Soon after, a catalog of the same color comes to our house in the mail. While I try my best to toss all such solicitations, the one with the robin's-egg blue cover survives my efforts to minimize the information content of the household. Observing my wife gazing at the catalog reveals her joy in simply turning the pages and imagining. Apparently, the huge prices associated with the goods fail to inhibit the delight of her shopping experience.

In the case of my wife, the color of robin's-egg blue evokes an emotional response for her as a shopper in the market for jewelry, china, picture frames, baby rattles, leather goods and a host of other high-end items found in

the Tiffany catalog. The distinctive color is an important cognitive touch-point of her user experience that eventually triggers the purchase of an expensive luxury item (read enormous profit margin). I submit that the robin's-egg blue is an important design element in the overall commercial success of Tiffany & Co.

But if the color design attribute is so important to the user experience, why don't other companies emulate it? It turns out that the use of the robin's-egg blue on boxes, package wrappings, shopping bags and even catalogs is the monopoly right of Tiffany & Co. (with four separate registered trademarks). Again, for emphasis: **Tiffany & Co. has a legal monopoly on the use of robin's-egg blue on packaging, bagging and the cover of its catalog.** This finding led me to begin exploring to what extent color and other relatively primitive elements of design can be secured indefinitely with a registered US trademark?

### **Color Me Profitable**

The color purple in the market for gastrointestinal medications may not seem important unless you suffer from chronic heartburn. If you do, you know that the purple pill means Prilosec or its more recent embodiment, Nexium. This drug is a record-breaking blockbuster that earns as much as \$6 billion a year for AstraZeneca Inc. (AZ). The color purple is the cognitive touch-point that gives hope for relief from painful heartburn. The color purple as used on AZ's pills and packaging is a registered trademark. **The patent on the Prilosec compound expired in 2001, and generics and the corresponding price competition entered the market soon thereafter. But by carefully guiding the brand-loyal market segment from Prilosec to Nexium in its advertising and the use of purple, AZ has sustained its \$6 billion dollar revenue stream through 2005, four years after the original patent expiration.**

In the housing market, Owens Corning's registered trademark color pink triggers an association of quality and efficiency among those looking for insulation materials. Its widespread recognition is the result of a carefully orchestrated advertising campaign, with Pink Panther commercials and a "think pink" tagline, that built a significant association between pink and high-quality insulation. A trip to Home Depot demonstrates that the pink stuff costs appreciably more than a non-pink alternative.

In the market for mobile telephone materials, the color magenta is the unique source identifier (registered trademark) of T-Mobile and its parent Deutsche Telekom. When branding giant Intel overlooked the breath of this mark and errantly introduced magenta into the Centrino logo for mobile technology, DT responded with an army lawyers. Intel quietly retreated to another color.

Brown in transportation and marketing logistics is the domain of UPS and is a registered trademark on trucks and uniforms. Is it any surprise that UPS's advertising calls on consumers to "call brown" for supply chain challenges?

### **Shape and Form**

Central design elements, such as shape and form, can also be registered as trademark source identifiers in a defined market for goods. Perhaps the best-known shape that has realized this level of security is the silhouette of the Coca Cola bottle. Trademark registrations for the Coke bottle have evolved over time to reflect an increasingly abstract geometry and hence a more powerful and universal source identification mark.

Levi Strauss has pursued a similar strategy in its effort to secure the source identity aspects of its unique and classic jeans design attributes. The company has registered the overall shape and layout of the backside of a pair of jeans and separately registered the iconic stitching pattern on their pockets.

Nintendo has succeeded in differentiating itself in the market for computer games with the configuration of its controller product. Interestingly, Nintendo succeeded in registering both the form and the color of these products as separate and distinct source trademark elements. This strategy was successfully deployed to several generations of game controllers and extended to its game cube. Nintendo's unique product configuration is so well associated with game controllers that it has become the icon for game controller functionality used in the Windows XP control panel.

Beyond the world of static shape and form, Yamaha has succeeded in registering a stream of water as the unique source identifier for the Wave Runner line of personal watercraft. That's right, that silly, rooster-tail shaped water jet that fires up off the back of the unit when you crank the throttle is a registered trademark. This water stream is the monopoly source identifier of Yamaha's Wave Runner and cannot be found on competing products from Polaris or Seadoo.

Garmin, a small company in the navigational products market, similarly has a registered trademark on its spinning globe, which appears on the device's screen when you initiate its software applications. Yes Professor Arnheim, chapters 8 and 9 also apply!

### **Sound, Smell and Taste(?)**

Our research has extended beyond visual perception into the realm of both aural and olfactory perception. **Perhaps the best-recognized sound that is registered as a trademark is the five-tone progression of Intel played at the end of all its media advertisements.** NBC's three-tone progression, which has evolved little over the last 50 years, usually is visually connected to the media giant's trademarked peacock.

Midwest Biologicals Inc. has registered the scent of bubblegum as a source identifier on its machining oil and metal-cutting fluids. A stroll through one of its facilities might seem like a trip to Willy Wonkas' factory.

Akzo-Novel's subsidiary Organon is now attempting

to register an orange flavor as a trademark in the market for pharmaceutical antidepressants.

### Building Secondary Meaning

Successful registration of a trademark is the result of a process that examines the uniqueness and appropriateness of the desired design element as a mark. Fanciful names or other word marks, such as Camay (for soap) or Lexus (for automobiles), are arbitrary and hence relatively easy to register. Nontraditional marks, such as colors, shapes, dynamic motions, sounds and smells, often require the demonstration of secondary meaning, a measure of association between the chosen source identifier (color, shape, etc.) and the source of the goods that must be objectively determined using third-party market surveys. If the survey results indicate there is a high correlation (more than 70 percent) between the identifier and the source of the goods in the mind of the target market, secondary meaning is satisfied and the mark can be registered.

The building of secondary meaning requires clever, premeditated advertising and promotion. The Pink Panther TV advertising campaign launched by Owens Corning over 30 years ago lives on today at [www.owenscorning.com](http://www.owenscorning.com). The conspicuous use of pink in the company's advertising sustains and continues to build secondary meaning and trademark strength.

When AZ launched Nexium in 2001, it used a tagline ("Today's purple pill is Nexium") to reinforce the association of the color and brand—a tagline that it continues to use today. Further reinforcement: the URL for the online patient information source is [www.purplepill.com](http://www.purplepill.com), a Web site that itself is very purple. AZ has clearly chosen to emphasize this color design attribute in a manner that builds and reinforces secondary meaning.

### The Big Picture: Design Language, Semiotics and the Law

Arnheim's reconciliation of visual design elements with the tenets of psychology creates a framework for how we can use design proactively to communicate meaning, a framework that has given rise to the contemporary study of design semiotics, an emerging field that examines how design languages are used to convey meaning. Designers are the active manipulators of coded design languages to realize a particular response or meaning in a societal context.

In intellectual property law, language encodes various levels of meaning that are protected. Explicit meaning is addressed by copyright laws. Functional denotative meaning and the deterministic view of language are the realm of utility patents. Signification meaning is the realm of trademarks and trade dress. Aesthetic codes are protected by design patents. This reconciliation of legal realms through a semiotic framework provides some insight into how best to reconcile a clever or "great" design with the appropriate intellectual property protection mode.

### Intellectual Property and the Increasing Significance of Design

Professionals who design differentiation in product and service offerings are giving rise to the opportunity for wealth creation. Without the proactive management of intellectual property, the innovator's ability to build and/or sustain market value is compromised. Designers who know how to legally encode a unique product differentiation and/or cognitive touch-point will have a strong competitive advantage.

Designers play a critical role in determining the cultural and legal significance and the trademark security of their products, but most designers are unaware of this impact. In fact, many designers feel threatened by the cost-competitive design and engineering talent that offshoring has created. Therein lies opportunity for designers in the US, which grants exclusive rights to unique inventive (patents) or expressive (copyright) combinations. The framers of the US Constitution were heavily influenced by John Locke, David Hume and other 17th- and 18th-century philosophers who argued that creators and inventors had a moral right to the fruits of their labors. The intellectual property regimes are legal mechanisms to secure innovative designs from unauthorized infringement, usage or misappropriation. Like the right to vote, however, designers must take advantage of the legal protections if they want to have a voice.

Back to Arnheim: As I was putting the finishing touches on this article, I was looking over *Art and Visual Perception*. Seeing me with the book in my lap, my wife approached and asked, "Honey, can I see that when you are done?"

I was baffled. She rarely expresses an interest in my intellectual fancies...It was then that I noticed that the cover of the book is robin's-egg blue. ■

**Acknowledgments:** This article benefits from substantial conversations with Mark Dziarski, who teaches with me in the Master of Product Development Program at Northwestern University. Further, law school colleague Professor Clinton Francis and Kellogg School Research Fellow David Orozco are the visionaries behind the idea on intellectual property as a semiotic form.

**Disclaimer:** While my colleagues and I have studied trademark law extensively and have lawyers and law professors as students and colleagues, we are not licensed to practice law. As such, nothing in this article should be construed as legal advice.