

*A Winthrop & Weinstine blog dedicated to bridging the gap between legal & marketing types.*

## [Taste Infringement?](#)

Posted on June 6, 2011 by [Steve Baird](#)



We've spent some time here discussing the world-famous Coca-Cola brand. Most recently, David Mitchell wrote about the [incredible consistency](#) of the Coca-Cola brand over the past 125 years. A while back Dave Taylor wrote a nice [Ode to the Brand of Brands, the King of Cola: Coke](#).

And, let's not forget my [humble](#) suggestion that a roadside sign promoting Coca-Cola at a drive-in restaurant that actually sells Pepsi instead of Coke, might be a [good example of an appropriate application of the initial interest confusion test](#).

But, what about Coca-Cola's frequent reference to "[taste infringement](#)" -- some cleverly novel and suggestive legalese apparently coined by the Coca-Cola brand a few years back with its launch of Coke Zero?

Putting aside [Brent's](#) fair question of [whether the ads are a good idea](#), some of my favorite ads have been the Coke Zero viral ads, where a variety of lawyers are punk'd on hidden cameras, led to believe they are being interviewed by Coca-Cola representatives to take legal action for "taste infringement" -- against the Coca-Cola team down the hall, the rival team of co-workers behind the Coke Zero launch.



WINTHROP WEINSTINE

ATTORNEYS AND COUNSELORS AT LAW

[This one is my favorite](#), with lines such as these:

*"Are you aware that Coke Zero tastes a lot like Coca-Cola?"*

*"There might be some taste infringement issues."*

*"I think it's basic taste infringement, I'd like to stick with that phrase."*

*"Basically, a patent/copyright, a little too closely."*

The ads are silly and I suspect most viewers appreciate the ridiculousness of Coca-Cola suing itself, but I'm not so sure people understand "taste infringement" to be a ridiculous or faux-legal claim -- especially in this environment of increased focus and attention on the expansiveness of intellectual property rights. So, perhaps you heard it here first, there is no such legal claim.

In [The Great Chocolate War](#), as reported by Jason Voiovich, the legal claim that Hershey's -- owner of the coveted Reese's brand -- brought against Dove's competing peanut butter and chocolate candy, was based on trade dress. Notably, there was no asserted claim of "taste infringement". No one owns the combined taste of peanut butter and chocolate, thank goodness.

That's not to say, however, that there aren't intellectual property rights impacting the human sense of taste. For example, with respect to trademarks, we've [written before about the possibility of taste being the subject of a non-traditional trademark](#), but to the best of my knowledge, none has been acknowledged or even identified to date. If you have information to the contrary, please share your insights here.

Of course, there is a reason for the lack of or scarcity of taste trademarks. Any product intended for human consumption is unlikely a candidate for taste trademark protection given the functionality doctrine. So, Coca-Cola can't stop another from selling a beverage that has the same taste as Coca-Cola, just because it tastes the same, unless of course, the maker of the competitive beverage hired away key Coke employees who unlawfully revealed the closely guarded secret formula. That is how trade secret litigation happens, not "taste infringement" litigation.

And, as you may have heard, about five years ago, the Trademark Trial and Appeal Board (TTAB) of the U.S. Patent and Trademark prevented registration of the flavor orange for an oral anti-depressant medication, [finding it to be functional and incapable of serving a trademark function](#). The orange flavor didn't make the pharmaceutical compound itself work better, but the improved taste did enhance patient compliance, rendering the flavor functional, and not capable of identifying the source of the product.

I have suggested before that taste is only available as a possible non-traditional trademark when it is applied to a product not meant for human consumption (e.g., [flavored ear rests on eyeglasses and flavored ballpoint pen caps](#)).



Foods, beverages, and other oral products that are meant to be consumed or placed in the mouth and have a pleasing taste most likely are to be disqualified from enjoying trademark protection in the taste or flavor, based on the functionality doctrine. But, what about patent protection on taste?

While I suppose it may have been possible for Coca-Cola to obtain a patent on the formula back in the day (patent types, was there a patent statute 125 years ago?), the success it has enjoyed for 125 years in keeping the formula a closely guarded secret best explains why we hear more about secret recipes and formulas in our favorite food and beverage products and less about patents covering them.

Patents have [limited terms](#), but [trade secret protection](#) can last forever, provided the subject matter remains secret. Another downside to patent protection of a recipe or formula is the requirement that it be made public, which has the effect of making it part of the public domain after the patent term expires.

So, not surprisingly, in connection with the celebration of Coca-Cola's 125 year anniversary, I just picked up a Delta airline in-flight napkin seeming to confirm the benefit inherent in pursuing the trade secret method of protection for Coca-Cola's formula:

*"Delicious and refreshing for 125 years. Our secret? Actually, it's our secret formula. Crisp and zesty on the first sip. Smooth and rich by the last. For 125 years, we've been proud to refresh the world. And we're just getting started."*

Had Coca-Cola made its formula public, which is a requirement for obtaining patent protection, I seriously doubt it would have been able to build the world-famous brand it has to date. I suspect the same is true of [Colonel Sanders' finger licking secret recipe](#) for Kentucky Fried Chicken too.

Given all that, while it probably does make sense to [patent the composition and use of "bitter blockers" as ingredients in foods, beverages, pharmaceuticals, and other products](#), when it comes to building strong food and beverage brands the best approach is likely to continue to be focused on closely guarding their trade secret recipes and formulas.

