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Why Coca-Cola’s Fictional Lawsuit Against Coke Zero for Taste Infringement is a Losing Battle

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NOTES

WHY COCA-COLA'S FICTIONAL LAWSUIT AGAINST COKE ZERO FOR TASTE INFRINGEMENT IS A LOSING BATTLE

Jessica Nicole Cox *

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* J.D. Candidate 2010, University of Georgia School of Law. The author would like to thank Professor David E. Shipley, Professor Joseph Miller, and my fellow Journal members for their help in creating and editing this Note. Additionally, many thanks to family and friends for their love and support throughout this process.
PHIL ROSE (Actor posing as a Coca-Cola Senior Brand Manager): “Do you think that we, as the Coke brand, would have a case against the Coke Zero brand . . . for taste infringement? (Silence. No response.) What’s your specialty?”

LAWYER (Actual attorney who has no idea any of this is fake): “I am in real estate law.”

PHIL ROSE: “Perfect. Let’s say this is a property. (Points toward the Coca-Cola can.) Architectural. It’s been made a landmark. Next door somebody buys the lot and builds an eerily similar house. What can we do there? Let’s put on the lawyer pants and walk down that path.”

In 2007, the Coca-Cola brand launched a marketing campaign based on an imaginary lawsuit for “taste infringement.” The advertisements jokingly posit that “Coke Zero stole the taste of Coke” and potential “victim[s] of taste confusion” are encouraged to seek legal representation. The premise of taste infringement, as stated by one attorney on hidden camera, is “the possibility that consumers will start drinking [Coke Zero] thinking they are drinking [Coca-Cola].” The advertising campaign produced numerous viral video commercials and a website.

Although these advertisements are intended as a joke to highlight how similar Coke Zero’s taste is to that of Coca-Cola, the idea of taste infringement might have a plausible legal basis. Product color, sound, shape, and scent have each been afforded legal protection as nontraditional trademarks. With the...

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4 See Elliott, supra note 2 (stating the advertising campaign “relies largely on new-media efforts like e-mail marketing, video clips posted to websites, and digital banner advertising”).

broadening scope of trademark coverage for non-visual marks, it seems inevitable that the boundaries of trademark law will be challenged in the coming years, possibly to the point of protecting product taste.

The Coca-Cola Company is the largest beverage producer in the world. The corporation's namesake beverage, Coca-Cola Classic (Coca-Cola), is a unique product with a distinct flavor. Over the years, consumers have been subjected to taste tests involving Coca-Cola to determine whether it is the premier cola beverage. If trademark status is extended to the flavor of Coca-Cola, a “taste infringement” lawsuit against other cola beverages could become a legal reality.

Trademark protection for the flavor of a cola beverage is only possible if Coca-Cola can (1) demonstrate source indication or secondary meaning in the flavor and (2) prove that the flavor is not functional. This Note explains why Coca-Cola will not be able to protect its unique flavor through trademark law. Part II of this Note chronicles the development of trademark law and the broad scope of protection awarded to a variety of nontraditional trademarks. Previous attempts to trademark flavor, each unsuccessful, are discussed. Trademark doctrines, including source indication, functionality, likelihood of confusion, and graphical depiction are discussed in relation to protection of a beverage taste.

Part III of this Note analyzes whether Coca-Cola’s unique flavor can satisfy the requirements for trademark protection. Practical considerations for extending trademark protection to cover product taste are also addressed. Ultimately, this Note concludes that Coca-Cola most likely cannot secure trademark protection for its unique flavor because of the functionality doctrine and the difficulties encountered with registration and enforcement of such a nontraditional trademark.

II. BACKGROUND

This Part begins by addressing the foundations and purposes of trademark protection. Next, nontraditional trademarks are discussed, including the various types of visual and non-visual marks acknowledged in the United States, and the particular troubles with registering them. Finally, the requirements to trademark unique flavors are discussed, along with the likelihood of success in an infringement action.

Plumeria scent of sewing thread).

8 See Pepsi Challenge, http://www.pepsiusa.com (click “Ads & More” and select “Pepsi Legacy”; then click through to slide 8/15) (last visited Sept. 6, 2009) (describing the “Pepsi Challenge” as a marketing promotion to have consumers participate in a blind taste test of Coca-Cola and Pepsi Cola to determine which beverage is America’s favorite).
A. TRADEMARK PROTECTION GENERALLY

Trademark law in the United States is rooted in the Trademark Act of 1946, also known as the Lanham Act.9 The Lanham Act grants national protection for trademarks and provides a federal cause of action for infringement.10 In addition to the federal statute, individual states create and enforce trademark law, creating a dual system of regulation.11

Trademark protection frequently coincides with formal registration of a mark. Actual or constructive use of the trademark in interstate commerce, not registration with the government, triggers protection of the mark.12 Registration, though not required, is beneficial because it protects the owner's interest by providing constructive notice of ownership to all would-be infringers.13 Additionally, registration creates a rebuttable presumption of validity, shifting the burden of proof to the defendant in an infringement action.14

Trademark law is intended to provide the mark owner profits generated by his good reputation and increase consumer confidence by eliminating confusion about the product's origin.15 The Supreme Court has acknowledged that trademarks assist consumers in identifying the item which they wish to purchase based on the past experiences with that particular brand.16 Therefore, trademarks reduce the costs of decision-making in the marketplace and promote efficiency.17 The trademark owner is protected against lost sales that occur when consumers purchase infringing products mistakenly believing they have purchased the mark owner's products.18 This concept is generally known as passing off or palming off.19

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10 See id. § 1114 (detailing remedies available to owners of infringed trademarks).
12 In re Int'l Flavors & Fragrances Inc., 183 F.3d 1361, 1366 (Fed. Cir. 1999).
13 74 AM. JUR. 2D Trademarks and Tradenames § 68 (2009).
17 Id.
19 Id.
Trademark law also creates incentives for individuals and corporations to invest in their brand names and logos. Specifically, potential infringers are prevented from misappropriating the benefits of the mark holder's labor and from causing reputational harm to the mark holder. Trademark protection is expansive, with the potential to endure forever if the mark remains valid and is renewed in perpetuity.

B. PROTECTION EXTENDED TO NONTRADITIONAL TRADEMARKS

Before the Lanham Act, protection for nontraditional marks was rooted in the principle of unfair competition, rather than trademark law. In Yellow Cab Transit Co. v. Louisville Taxicab & Transfer Co., the color yellow for a taxicab vehicle received protection after a businessman imported the concept from Europe to Chicago. Because the color and design schemes for the vehicles of both companies were substantially similar, confusion resulted among consumers and injunctive relief was necessary to prevent one company from profiting off the goodwill of a competitor. Although the Sixth Circuit refused to go so far as to grant appellant the exclusive right to use the color yellow, unfair competition law laid the foundation for the legal protection of nontraditional trademarks.

The Lanham Act defines a trademark as "any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . ." Nontraditional trademarks are generally defined as those marks which go beyond ordinary, two dimensional marks. The preamble of the Lanham Act provides a basis for expanding traditional trademark protection to include nontraditional marks: "No trademark . . . shall be refused registration on
the principal register on account of its nature . . . .” The guidance provided in the preamble to the Lanham Act and the broad statutory definition of “trademark” have paved the way for the protection of color, sound, shape, and smell. As one tribunal noted, the Lanham Act “essentially encompass[es] nontraditional trademarks by not excluding them.”

One of the oldest recognized nontraditional trademarks is the sound mark. National Broadcasting Company, Inc. acquired trademark protection for its unique chime consisting of tones G-E-C in the key of C. The mark was first registered for radio as a service mark, and later re-registered for use on television. Other notable sound marks include the Pillsbury Doughboy’s giggle, the quack of the AFLAC duck, the familiar “ho, ho, ho” of the Jolly Green Giant, the MGM lion’s roar, and the Harlem Globetrotters’ theme song. Musical compositions are also eligible for trademark protection.

Trademark protection for sound has encountered some opposition. For example, Harley-Davidson, Inc. filed an application to protect the “exhaust sound of . . . [its] motorcycles, produced by V-Twin, common crankpin motorcycle engines when the goods are in use.” In response, many attorneys and competitors urged the rejection of the mark fearing it would create an unfair monopoly. The United States Patent and Trademark Office (USPTO) nonetheless granted the application and nine competitors filed opposition to the...
mark. After more than six years of litigation, Harley-Davidson abandoned the application leaving the engine sound unprotected.

There are a number of difficulties involved in successful registration of a sound mark. A sound cannot be graphically represented as easily as a word mark. The USPTO does, however, maintain digital files of registered sounds in its database. Additionally, the English language limits the ability to represent a sound on paper because there are a finite number of words available to describe a specific noise. Enforcing a sound mark in an infringement action presents substantial obstacles, but is not impossible.

A shape mark, or a three-dimensional mark, typically applies to the shape of the product itself or its packaging. The triangular shape of a chemical cake was afforded trademark protection by the United States Court of Customs and Patent Appeals (CCPA) in In re Minnesota Mining and Manufacturing Co. The shape adopted by the applicant was arbitrary and chosen to indicate the origin of the good to the consumer. The CCPA noted that when the shape or feature of a product is arbitrary, there is "no public interest to be protected" that would preclude trademark status.

If the shape of a product is a functional feature of an ornamental design to enhance the appearance, it should be protected by a utility or design patent rather than a trademark. Although design patents can be filed on the same subject matter as trademarks, the two regimes offer different protections and have varying requirements for protection. A design patent lasts for fourteen years, while trademark protection has the potential to endure forever. Additionally,
design patents require the product feature to be "new and non-obvious," compared to trademark requirements of source indication, nonfunctionality, and no likelihood of confusion.

A third type of nontraditional trademark is the color mark, which usually consists of a single color associated with a commercial product. In *Qualitex Co. v. Jacobson Products Co.*, the Supreme Court stated that product color fits within the regulatory scheme of the Lanham Act and could be protected as a trademark. Trademark protection was awarded to the green-gold color of a manufacturer's dry cleaning press pad. Consumers' reliance on the green-gold color to identify the source of the dry cleaning pad was an important consideration for the Supreme Court and the driving factor in awarding trademark protection.

One mechanism used for the trademark protection of color is the PANTONE Color System. This commercial color classification system uses numbers to identify specific shades of color. Thousands of colors are identified in the PANTONE system. The PANTONE Color System was utilized by the United Parcel Service to describe its signature brown color in an application for federal trademark registration. The development of the PANTONE process has brought concreteness to the use and protection of color marks.

The final category of nontraditional trademark is the scent mark. Scents can be registered as trademarks if a sufficient amount of evidence can be produced to show that the scent can function as a trademark. Sewing thread and embroidery yarn smelling of a "high impact, fresh, floral fragrance reminiscent of Plumeria

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55 1 MCCARTHY, supra note 11, § 6:6.
56 Id. § 3:3.
57 Gilson & LaLonde, supra note 27, at 777.
58 514 U.S. 159, 162 (1995); see also In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1122 (Fed. Cir. 1985) (approving trademark status for the color pink of fibrous glass residential insulation).
59 Qualitex, 514 U.S. at 159.
60 Id. at 166.
61 Gilson & LaLonde, supra note 27, at 776.
62 Id. at 778.
64 Gilson & LaLonde, supra note 27, at 778 (noting United Parcel Service registered "the color chocolate brown, which is the approximate equivalent of PANTONE 462C" for its fleet of service vehicles and uniforms).
65 See id. at 779 ("The PANTONE System is a useful day-to-day tool for the trademark lawyer for making color comparisons between two products or logos.").
67 1 MCCARTHY, supra note 11, § 7:106.
blossoms” received trademark protection in In re Clarke. The Trademark Trial and Appeal Board (TTAB) analogized scent to color in the absence of any nonfunctional scent precedent. Scent was determined to be capable of identifying and distinguishing products, which would qualify it for trademark protection. The TTAB emphasized that the Plumeria fragrance was “not an inherent attribute or natural characteristic of applicant’s goods but is rather a feature supplied by applicant.”

Scent marks are similar to flavor marks because scent and taste perceptions are subjective and unique to each individual. Although both marks are completely non-visual, a detailed written description is required for registration. To remedy the troubling aspects of extending trademark protection to scent, a variety of mechanisms have been developed to foster objectivity, including “electronic nose” technology. Additionally, spectrograms, oscillograms, and spectrums can provide more certainty by depicting scents in an objective, visual manner.

C. FLAVOR PROTECTION ATTEMPTED, BUT DENIED

A pharmaceutical company recently filed a pioneering trademark application for the flavor of a product. On June 14, 2006, the TTAB refused registration of a mark for the “orange flavor” of a quick-dissolving antidepressant tablet. The TTAB determined that the “orange flavor” could not act as a trademark. The examining attorney denied the registration because (1) “orange flavor” did not identify or distinguish the applicant’s goods from others, and (2) the flavor was functional, precluding protection under 15 U.S.C. § 1052(e)(5). The TTAB
noted that many oral pharmaceutical products carry an orange flavor including "cough drops, vitamins, and herbal medications," thus applicant's mark was not sufficiently distinctive to warrant protection. Additionally, the orange flavor was functional and ineligible for trademark protection because it was added to make the medicine more palatable.

Similarly, in 2000 another pharmaceutical company attempted to trademark the "taste of artificial strawberry flavour" for use in its pharmaceutical products in Europe. Since the creation of the European Union, trademark law in Europe has steadily developed into a uniform body of law with "striking structural similarities" to the United States system. The Office of Harmonization in the Internal Market (OHIM) is the European equivalent of the USPTO, responsible for registering trademarks for the European Union member countries.

OHIM denied the pharmaceutical company's application for two reasons: (1) the mark lacked distinctive character, and (2) the mark was not sufficiently precise to satisfy the graphical representation requirement. The OHIM Board of Appeals noted that awarding the mark to the pharmaceutical company would hinder its competitors in the marketplace. The OHIM Board of Appeals strongly believed the "taste of artificial strawberries" could not adequately distinguish applicant's pharmaceutical products from one of its competitor's.

Both gustatory applications for trademark protection were denied because of their generic descriptions and the functionality of the flavors. The orange and strawberry flavors used in the pharmaceutical products were intended to mask the unpleasant taste of the other ingredients. These decisions leave open the question of whether a non-pharmaceutical product could successfully secure protection for a taste mark.

D. COCA-COLA'S PATH TO PROTECTION

This Part discusses three requirements for securing trademark protection and one additional requirement for official registration of a trademark: (1) the flavor

79 Id. at 1643-50.
80 Id. at 1645.
83 See id. at 895 ("The tendency [in European trademark cases] . . . is to expand protection, although in a less pronounced way than in the United States.").
86 Id.
has acquired secondary meaning, and so acts as a source indicator, 88 (2) the flavor is not functional, 89 (3) there is a likelihood of consumer confusion if the flavor is not given protection, 90 (4) and the flavor can be represented in a written description. 91

1. Source Indication and Secondary Meaning. The first hurdle to obtaining trademark protection is demonstrating a flavor’s ability to indicate the source of the product. 92 The Supreme Court created a framework for determining a product’s indication of source: “An identifying mark is distinctive and capable of being protected if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning.” 93

The flavor must indicate the origin of the product and not the product itself. 94 The Supreme Court has determined that some types of nontraditional trademarks are virtually incapable of being inherently distinctive. For example, the Court acknowledged that “a product’s color is unlike ‘fanciful,’ ‘arbitrary,’ or ‘suggestive’ words or designs, which almost automatically tell a customer that they refer to a brand.” 95

In the current framework, a taste mark protected as a nontraditional trademark must demonstrate “secondary meaning.” 96 The Restatement (Third) of Unfair Competition defines “secondary meaning” as being achieved when a mark is “uniquely associated with a particular source.” 97 The Supreme Court has stated secondary meaning is acquired when, “in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.” 98 Under this formulation, an applicant attempting to

88 See 15 U.S.C. § 1127 (2006) (“The term trademark includes any word, name, symbol, or device . . . to indicate the source of the goods, even if that source is unknown.”).
89 See id. § 1052(e)(5) (“No trademark . . . shall be refused registration . . . unless it . . . is functional.”).
90 See id. § 1052(d) (“No trademark . . . shall be refused by registration . . . unless it . . . consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office . . . to cause confusion, or to cause mistake, or to deceive.”).
91 See id. § 1051(a)(2) (“The application shall include . . . a drawing of the mark.”).
92 1 MCCARTHY, supra note 11, § 3:1.
94 See Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118 (1938) (denying trademark protection for the term “shredded wheat” because “the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.”).
96 See id. at 163 (stating that trademark protection requires consumers to use the mark to identify and distinguish the source of specific goods).
98 Qualitex, 514 U.S. at 163 (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851
secure trademark protection for a flavor must demonstrate that the flavor serves only to indicate who produced the good, rather than the good itself. 99

Secondary meaning can be demonstrated in a variety of ways, including the length of time the mark has been in use, advertising expenditures, volume of sales, and professional opinions within the trade. 100 For example, in securing trademark protection for its signature pink-colored housing insulation, Owens-Corning Fiberglas Corporation proffered evidence of forty-two million dollars expended for advertising and 50% customer recognition of its product to demonstrate secondary meaning. 101 Although these factors standing alone do not necessarily demonstrate that the mark indicates the source of the good, each provides substantial evidence of secondary meaning. 102

2. Functionality Doctrine. The most substantial barrier to establishing a taste mark under the current trademark system is the functionality doctrine. 103 Over the past century, a combination of “case law, restatement, and commentary” confirms that trademark protection will not be extended to any functional aspect of a good. 104 Congress codified this principle stating “[n]o trademark ... shall be refused registration ... on account of its nature unless it ... consists of a mark which ... as a whole, is functional.” 105 The patent system, not the trademark regime, is the appropriate vehicle for protecting functional product features. 106 One commentator has emphasized that trademark law cannot “properly make an ‘end run’ around the strict requirements of utility patent law by giving equivalent rights to exclude.” 107 By preventing trademark protection for functional aspects

99 See Susie Middlemisss & Carina Badger, Nipping Taste Marks in the Bud, 26 EUR. INTELL. PROP. REV. 152, 153 (2004) (“The essential function of a trade mark is to guarantee the identity of the origin of the marked product or service . . . .” (emphasis added)).


101 In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1127 (Fed. Cir. 1985) (citing In re Beatrice Foods Co., 429 F.2d 466, 472 (C.C.P.A. 1970)).

102 Seabrook, 568 F.2d at 1345.

103 See Gilson & LaLonde, supra note 27, at 800 (“One substantial impediment to enforcement of flavor marks is functionality.”).


107 1 MCCARTHY, supra note 11, § 7:64.
of a product, competition is promoted because the limited number of design configurations will not be exhausted.\textsuperscript{108}

Defining an aspect of a good as "functional" is a complex, difficult task for courts to undertake.\textsuperscript{109} Early in trademark jurisprudence, some courts equated "functional" with "essential."\textsuperscript{110} An alternate standard later put forth by the Restatement of Torts is that a feature is functional if "it affects . . . purpose, action or performance, or the facility or economy of processing, handling or use[e] [of the good]."\textsuperscript{111}

The Supreme Court adopted its own standard in \textit{Inwood Laboratories, Inc. v. Ives Laboratories, Inc.}, stating that "a product feature is functional if it is essential to the use or purpose of the article or it affects the cost or quality of the article."\textsuperscript{112} Two types of functionality are recognized from the \textit{Inwood} formulation: (1) utilitarian functionality and (2) aesthetic functionality.\textsuperscript{113} A design feature falls under utilitarian functionality if "it is essential to the use or purpose of the article."\textsuperscript{114} On the other hand, aesthetic functionality is present if the design feature "affects the cost or quality of the article."\textsuperscript{115}

The Supreme Court's subsequent decision in \textit{Qualitex} expounded on the \textit{Inwood} standard of functionality, adding that a design feature is also functional "if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage."\textsuperscript{116} The \textit{Inwood} and \textit{Qualitex} standards should be applied in order of announcement; thus if functionality is established under \textit{Inwood}, the \textit{Qualitex} formulation is never reached.\textsuperscript{117}

Courts look to a number of factors as evidence of functionality.\textsuperscript{118} The CCPA identified four areas of evidence (the \textit{Morton-Norwich} factors) for determining

\begin{footnotes}
\footnotetext[108]{\textit{Two Pesos, Inc. v. Taco Cabana, Inc.}, 505 U.S. 763, 775 (1992).}\)
\footnotetext[109]{\textit{Weinberg, supra} note 104, at 5.}\)
\footnotetext[110]{\textit{See, e.g., Marvel Co. v. Pearl, 133 F. 160, 161 (2d Cir. 1904) ("In the absence of protection by patent, no person can monopolize or appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted."); Flagg Mfg. Co. v. Holway, 59 N.E. 667, 667 (Mass. 1901) (holding the defendant had the right to copy "the plaintiff's instrument in all essential and many non essential details").}\)
\footnotetext[111]{\textit{Restatement (First) of Torts} § 742 (1938).}\)
\footnotetext[112]{456 U.S. 844, 851 n.10 (1982).}\)
\footnotetext[113]{\textit{Weinberg, supra} note 104, at 9.}\)
\footnotetext[114]{\textit{Id.}\)
\footnotetext[115]{\textit{Id.}\)
\footnotetext[117]{\textit{Weinberg, supra} note 104, at 25.}\)
\footnotetext[118]{\textit{See In re Morton-Norwich Prods., Inc.}, 671 F.2d 1332, 1340 (C.C.P.A. 1982) (stating a number of positive and negative factors are available to aid in the determination).}\)
\end{footnotes}
whether a product feature is ineligible for trademark protection vis-à-vis the functionality doctrine.\textsuperscript{119} Courts are to examine:

(1) the existence of a utility patent disclosing the utilitarian advantages of the design; (2) advertising materials in which the originator of the design touts the design's utilitarian advantages; (3) the availability to competitors of functionally equivalent designs; and (4) facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product.\textsuperscript{120}

An expired utility patent is considered heavy indication of functionality.\textsuperscript{121} Additionally, information contained in the patent prosecution history can provide valuable insight as to whether the design feature is functional.\textsuperscript{122} As noted by the Federal Circuit, patent law is the appropriate vehicle for protecting useful product features, thus the Court will place heavy emphasis on an expired patent.\textsuperscript{123}

Concern for the effect of trademark protection on consumers, however, "is really the crux of the matter."\textsuperscript{124} As the Supreme Court has emphasized, "[c]onsumers should not be deprived of the benefits of competition."\textsuperscript{125} The cost of alternative designs is considered in determining functionality because granting trademark protection when other available options are cost prohibitive essentially grants the trademark owner a monopoly over essential design aspects.\textsuperscript{126} With respect to taste marks, and consumable foods specifically, certain flavors are more likely to be considered functional because there is a substantial demand for them in the marketplace.\textsuperscript{127} An example given by two commentators is illustrative:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{119} Id. at 1340–41.
\item \textsuperscript{120} Value Eng'g, Inc. v. Rexnord Corp., 278 F.3d 1268, 1274 (Fed. Cir. 2002) (citing Morton-Norwich, 671 F.2d at 1340–41).
\item \textsuperscript{121} See TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29 (2001) (holding a dual-spring design that was previously protected by a utility patent is functional, and thus cannot be protected); see also Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 119–20 (1938) (holding the pillow-shape of the shredded wheat biscuit was dedicated to the public after the expiration of the patents, thus the shape was not eligible for trademark protection).
\item \textsuperscript{122} Weinberg, supra note 104, at 45.
\item \textsuperscript{123} Value Eng'g, 278 F.3d at 1273.
\item \textsuperscript{124} In re Morton-Norwich Prods., Inc., 671 F.2d 1332, 1341 (C.C.P.A. 1982).
\item \textsuperscript{125} Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 213 (2000).
\item \textsuperscript{126} See Schwinn Bicycle Co. v. Murray Ohio Mfg. Co., 339 F. Supp. 973, 980 (M.D. Tenn. 1971) ("The basic policy which forbids the allowance of a trademark in functional features of a product is the policy to encourage and protect free and open competition."); Kellogg, 305 U.S. at 119 (holding trademark status cannot be granted to extend a monopoly over the "pillow" shape of shredded wheat biscuits).
\item \textsuperscript{127} Gilson & LaLonde, supra note 27, at 800–01.
\end{itemize}
\end{footnotesize}
An unusual flavor—like melon or caramel or peanut butter—added to a toothbrush or dental floss would be more likely to be protected than the same flavors for cookies or bread if food manufacturers would be more likely to have a competitive need for flavors than those who make dental hygiene products.\footnote{Id. at 801.}

3. Likelihood of Confusion. A mark that is likely to cause consumer confusion is not eligible for trademark protection.\footnote{15 U.S.C. § 1125(a)(1)(A) (2006); Graeme W. Austin, Tolerating Confusion About Confusion: Trademark Policies and Fair Use, 50 ARIZ. L. REV. 157, 157 (2008).} This principle ensures that mark owners can profit from the goodwill of their brand, a core purpose of trademark law.\footnote{Id.} Trademark owners thereby have an incentive to invest in their brand, providing higher quality goods to consumers.\footnote{Austin, supra note 129, at 158.} Congress codified the likelihood of confusion doctrine, stating “[n]o trademark . . . shall be refused registration . . . on account of its nature unless it [is] . . . likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.”\footnote{15 U.S.C. § 1052(d) (2006).} The likelihood of confusion standard for registering a trademark is also the standard required to prove trademark infringement.\footnote{See id. § 1125(a)(1)(A) (“Any person who . . . uses in commerce any word, term, name, symbol, or device . . . which is likely to cause confusion . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).}

But what constitutes “confusion”? Two types of confusion are identified in § 43(a) of the Lanham Act: (1) “confusion as to ‘affiliation, connection, or association of such person with another person’”; and (2) “confusion as to ‘the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.’”\footnote{LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS ch. 5, pt. 3, at 2 (Semaphore Press 2008), available at http://www.semaphorepress.com/ IntellectualPropertyLawOverview.html.} Prohibiting consumer confusion protects the “ordinarily prudent” purchaser by eliminating any possible misunderstanding about the source of a product.\footnote{Austin, supra note 129, at 157–58.} Additionally, producers are encouraged to invest in the goodwill of their brand because imitators will be prevented from infringing and creating confusion in the marketplace.\footnote{Id. at 158.}
Likelihood of confusion is a fact-based inquiry.\textsuperscript{137} The CCPA has created a multi-factor test for determining whether the challenged mark creates a likelihood of confusion among consumers in the marketplace.\textsuperscript{138} The factors to be considered are:

(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use. (3) The similarity or dissimilarity of established, likely-to-continue trade channels. (4) The conditions under which and buyers to whom sales are made . . . (5) The fame of the prior mark . . . . (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion. (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion. (9) The variety of goods on which a mark is or is not used . . . . (10) The market interface between applicant and the owner of a prior mark . . . . (11) The extent to which applicant has a right to exclude others from use of its mark on its goods. (12) The extent of potential confusion . . . . (13) Any other established fact probative of the effect of use.\textsuperscript{139}

These factors are to be judged in combination, but "[n]ot all factors are necessarily relevant in every case, and in some contexts, particular factors may be given more weight than others."\textsuperscript{140} The core factors are similarity of the mark, the defendant's intent, the proximity of the goods, and the strength of the plaintiff's mark.\textsuperscript{141}

One example of a confusingly similar mark is the electric clock at issue in \textit{Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.}\textsuperscript{142}

\textsuperscript{137} Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F.2d 280, 283 (1st Cir. 1947) ("[U]ltimate question of likelihood of consumer confusion as to source is one of fact.").

\textsuperscript{138} \textit{In re E.I. DuPont DeNemours & Co.}, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

\textsuperscript{139} \textit{Id.}; see also 6 McCARTHY, supra note 11, § 24:30 ("[E]ach of the 13 federal circuit courts of appeal has developed its own version of the list and each appears to be jealous of its own formulation of factors."); Barton Beebe, \textit{An Empirical Study of the Multifactor Tests for Trademark Infringement}, 94 CAL. L. REV. 1581, 1582 (2006) ("[F]ind[ing] significant variation among the [thirteen] circuits in the application and outcome of their respective tests.").

\textsuperscript{140} Austin, supra note 129, at 169.

\textsuperscript{141} Beebe, supra note 139, at 1623–38.

\textsuperscript{142} 221 F.2d 464 (2d Cir. 1955).
Vacheron manufactured and sold the Atmos clock, which had a "distinctive appearance and configuration."\textsuperscript{143} Mastercrafters soon thereafter began distributing the Model 308 clock that was designed to imitate the appearance of the Atmos.\textsuperscript{144} The Second Circuit held that "plaintiff copied the design of the Atmos clock because plaintiff intended to, and did, attract purchasers who wanted a 'luxury design' clock."\textsuperscript{145}

Consumer confusion can occur at many points in time.\textsuperscript{146} Initial interest confusion occurs when consumers mistakenly believe that the junior user's product is endorsed by the original mark holder prior to purchase.\textsuperscript{147} Point-of-sale confusion occurs when "consumers initially are attracted to the junior user's mark by virtue of its similarity to the senior user's mark, even though these consumers are not confused at the time of purchase."\textsuperscript{148} Finally, post-sale confusion happens when "customers are confused as to the source of the junior user's product when this product is observed in the post-sale context."\textsuperscript{149}

4. \textit{Graphical Requirement.} Although trademark registration is not required, it is discussed because of the many benefits it provides.\textsuperscript{150} A trademark applicant is required to submit a "clear drawing of the mark" when the application is filed with the USPTO for registration.\textsuperscript{151} Two types of drawings are identified: (1) "standard character (typed) drawing," and (2) "special form drawing."\textsuperscript{152} The standard type drawing is irrelevant in the context of a flavor mark because it only applies to marks consisting of "words, letters, numbers, or any combination thereof."\textsuperscript{153}

The special form drawing, on the other hand, applies to shape marks, color marks, and motion marks.\textsuperscript{154} For example, applicants seeking to register shape
marks are required to submit a special form drawing that "must depict a single rendition of the mark" and indicate the three-dimensional nature in the drawing. Color marks require a depiction of the color and identification of its name—the PANTONE color is acceptable, but the common name is also required.

All trademark applications must include a written depiction of the mark to be registered. Representing the trademark graphically allows the USPTO to publish the mark for opposition and provides notice to other potential applicants about the scope of the rights held by the mark holder. Despite its importance, the graphical requirement is not easily applied to the representation of a nontraditional trademark. In response to the increase of nontraditional trademark applications, federal law provides that "[a]n applicant is not required to submit a drawing if the mark consists only of a sound, a scent, or other completely non-visual matter." For sound, scent, and other non-visual marks, the applicant is not required to submit a drawing with the application; instead, a "detailed description of the mark" must be included.

### III. ANALYSIS

Putting aside the fictional lawsuit against Coke Zero, Coca-Cola does not have a persuasive argument to sustain a trademark infringement action against other cola beverages for taste infringement. The flavor of Coca-Cola likely does not meet the requirements for trademark protection, preventing both registration and an action for infringement. Identical flavors are fundamentally different from identical word marks. The taste of a beverage is likely functional, and thus, not protectable within the trademark framework. Taste marks, like color, sound, and scent marks, have peculiar characteristics that require tweaking the trademark

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155 Id. § 2.52(b)(2).
156 Id. § 2.52(b)(1).
157 Gilson & LaLonde, supra note 27, at 794.
159 Id.
160 See supra note 47 and accompanying text.
161 37 C.F.R. § 2.52(e) (2009); see also In re N.V. Organon, 79 U.S.P.Q.2d 1639, 1640 (T.T.A.B. 2006) (stating the examining attorney accepted "[t]his trademark application is for an orange flavor" as a sufficiently detailed description of the mark).
162 37 C.F.R. § 2.52(e) (2009).
163 See In re N.V. Organon, 79 U.S.P.Q.2d at 1651 ("[I]t is difficult to fathom exactly how a flavor could function as a source indicator in the classic sense, unlike the situation with other non-traditional trademarks such as color, sound and smell.").
framework to enable future registration and enforcement actions.\textsuperscript{164} Although Coca-Cola likely cannot protect its flavor, other taste marks may be able to do so in the future.

A. SOURCE INDICATION AND SECONDARY MEANING

For the Coca-Cola brand to successfully bring suit against other cola beverage companies for taste infringement, it must first establish that the taste of Coca-Cola fulfills the first trademark requirement of source indication.\textsuperscript{165} The Supreme Court has determined that source indication is found where the mark is inherently distinctive or has acquired distinctiveness through secondary meaning.\textsuperscript{166} The flavor of Coca-Cola cannot be inherently distinctive because the flavor indicates the particular product to consumers, rather than the source.

Similar to scent and color marks, protecting taste will require a showing of secondary meaning. The taste of a cola beverage alone is not the same as an arbitrary or fanciful word mark because it cannot automatically tell a consumer what particular brand the product comes from on its own. The nature of a taste mark "would seem to require sampling or smelling prior to purchase since the goods and the 'sign' cannot be separated."\textsuperscript{167} Although consumers are unable to sample the product prior to each purchase, the popularity of Coca-Cola suggests that consumers not only identify the unique taste, but also enjoy it such that pre-purchase taste testing is not required.

The Coca-Cola Company can likely establish secondary meaning for the flavor of its namesake beverage because it has been produced for over one hundred years and can be found in virtually every part of the globe.\textsuperscript{168} Coca-Cola is the "most popular and biggest-selling soft drink in history, and arguably the best known product in the world."\textsuperscript{169} Over the years a number of formal and informal taste tests have been performed to compare the taste of Coca-Cola to that of its main rival, Pepsi Cola.\textsuperscript{170} Known as the "Pepsi Challenge," this marketing

\textsuperscript{164} See Clarke, supra note 72, at 131 ("The extreme subjectivity of flavor perception would make PTO examination of flavors—and any subsequent related litigation—difficult."); supra note 47 and accompanying text.

\textsuperscript{165} See supra Part II.D.1 (discussing source indication and secondary meaning as requirements for trademark registration).


\textsuperscript{167} Middlemiss & Badger, supra note 99, at 153.


\textsuperscript{169} Id.

\textsuperscript{170} See supra note 8 (explaining a blind taste test conducted with Coca-Cola and Pepsi Cola to determine which beverage consumers preferred most).
promotion was designed to be a direct response to critical assertions that Pepsi Cola and Coca-Cola tasted the same.\textsuperscript{171} The Pepsi Challenge demonstrates the distinctiveness of Coca-Cola's flavor because consumers can discern the difference between the two cola beverages, establishing the uniqueness of Coca-Cola's taste and secondary meaning.

Further, a court will likely find that the taste of Coca-Cola has achieved secondary meaning because of the consumer outcry following the only flavor change in the history of Coca-Cola. In 1985, The Coca-Cola Company changed the taste of its signature beverage, coining the name “New Coke.”\textsuperscript{172} Although the new taste was preferred by customers in taste tests performed by the company, “testing and research could not measure the emotional attachment Americans had for the original formula.”\textsuperscript{173}

Loyal consumers were outraged over the variation from the original taste and “New Coke” was quickly removed from the market.\textsuperscript{174} In retrospect, the company noted “[t]he original taste had become more than just a soft drink, and consumers’ deep feelings, memories and loyalties to it came alive.”\textsuperscript{175} The failed attempt to change the original flavor shows that consumers have come to associate Coca-Cola with a particular taste, thus Coca-Cola can most likely satisfy its burden of proving secondary meaning. Although most taste mark applicants will have a difficult time proving secondary meaning, Coca-Cola occupies a unique position based on its market presence that is not enjoyed by the overwhelming majority of flavored items.

B. FUNCTIONALITY DOCTRINE

After establishing secondary meaning, Coca-Cola has the additional burden of demonstrating that its flavor is not functional.\textsuperscript{176} This factor is the difference between a successful and failed lawsuit for taste infringement. Under the Inwood formulation, Coca-Cola’s taste is not aesthetically functional because the taste will not essentially “affect[] the cost or quality of the article.”\textsuperscript{177} The perceived quality of Coca-Cola’s product is likely affected most by defective packaging or expiration of the product, rather than the flavor the company chooses for its beverage.

\textsuperscript{171} See supra note 8.


\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} See supra Part II.D.2 (discussing the functional bar to trademark protection).

\textsuperscript{177} See supra note 115 and accompanying text.
Although Coca-Cola's taste is not aesthetically functional, it is likely invalid under the utilitarian functionality standard because the flavor "is essential to the use or purpose of the article."\(^\text{178}\) Without its flavor, Coca-Cola would not be what it is. Coca-Cola is consumed for enjoyment and refreshment; without its flavor this objective could not be achieved. One commentator has stated, "if the smell is the trademark, then there's not much of any value which is left when you subtract the smell of the perfume from the product."\(^\text{179}\) The same principle applies to Coca-Cola: if the taste is the trademark and the taste is removed from the product, there is nothing left but flavorless liquid. The taste Coca-Cola seeks to protect is essential to the enjoyment of the product, and thus it falls within the Inwood standard for utilitarian functionality.

In addition to violating the Inwood standard for utilitarian functionality, the taste of Coca-Cola is also a violation of the Qualitex standard for functionality.\(^\text{180}\) Allowing taste mark protection would "put competitors at a significant non-reputation-related disadvantage" because Coca-Cola would be granted a national monopoly for the taste of its beverage.\(^\text{181}\) Consumers might prefer the specific taste that Coca-Cola has over other variants in the same market simply because they like the taste and not because it is Coca-Cola. This inherent preference for one flavor over another is not connected to the reputation of a specific soft drink bottler. Competitors wishing to produce a similar soft drink at a lower price will be expressly prohibited from doing so if the trademark is granted. Because Coca-Cola's exclusive use of its unique flavor would put its competitors at a "significant non-reputation-related disadvantage," the taste of Coca-Cola is likely functional under the Qualitex formulation, prohibiting registration or enforcement.

The TTAB refused registration of the orange flavor mark in In re N.V. Organon on the basis of functionality.\(^\text{182}\) The TTAB reasoned that the orange flavor was necessary to mask the taste of the medicine and make it more palatable so that the helpful effects can be delivered.\(^\text{183}\) The flavor of Coca-Cola, however, is functional in a different sense. The sole purpose of Coca-Cola is for consumption; the flavor is not meant to conceal any unpleasant taste, rather it is required for the beverage to be enjoyable and refreshing.

Coca-Cola's attempt would probably fail the functionality prong of the analysis because beverages, by nature, require a flavor. Commentators have posited that non-consumable products are the most likely candidates for taste mark protection.

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\(^{178}\) See supra note 114 and accompanying text.


\(^{180}\) See supra note 116 and accompanying text.

\(^{181}\) See supra note 116 and accompanying text (this analysis is not intended to address any protection of Coca-Cola's formula under trade secret law).

\(^{182}\) See supra notes 76–80 and accompanying text.

\(^{183}\) See supra notes 76–80 and accompanying text.
because there is no competitive need for those flavors. Consumers have certain expectations of vanilla and cinnamon when it comes to the taste of a cola beverage, thus, Coca-Cola should not be granted a monopoly on its particular flavor, given the finite number of acceptable tastes within the cola beverage marketplace. If this were a trademark suit, for example, over the taste of lickable wallpaper, the Coca-Cola Company would have a much stronger argument in favor of protecting its product's taste because there is no competitive need for specific tastes. Lickable wallpaper is a novelty item that can be used as a wall covering with or without its flavor, thus the taste is likely not functional.

This same idea is reflected in the area of scent marks. The TTAB has extended trademark protection of Plumeria-scented sewing thread and cherry-scented race car exhaust, but has refused registration of scent for perfume, cologne, and air freshener. The scent marks that have been successfully registered are nonfunctional, non-essential marks that display creativity and ingenuity. Coca-Cola's taste does not fall within this same category of marks and likely will not be able to secure trademark protection.

Coca-Cola's taste is required for the product to provide refreshment and enjoyment as intended by the manufacturer. Preventing other soft drink bottlers from offering similar tasting beverages places Coca-Cola's competitors at a "significant non-reputation-related disadvantage" because consumers might simply prefer one taste over another. Because the flavor of Coca-Cola is essential to its use and consumption, the taste is likely not eligible for trademark protection because of the functionality doctrine.

C. LIKELIHOOD OF CONFUSION

Coca-Cola, in its advertisements soliciting victims for taste infringement lawsuits, suggests that consumers experience confusion because Coca-Cola and Coke Zero taste strikingly similar. In evaluating a claim of taste infringement, a court would look to whether the similar flavor of another cola beverage creates a likelihood of confusion. If the taste of Cola X, for example, were so analogous to that of Coca-Cola that it created consumer confusion in the marketplace, then a likelihood of confusion would be established.

184 Gilson & LaLonde, supra note 27, at 801 ("An unusual flavor—like melon or caramel or peanut butter—added to a toothbrush or dental floss would be more likely to be protected than the same flavors for cookies or bread if food manufacturers would be more likely to have a competitive need for flavors than those who make dental hygiene products.").


186 Gilson & LaLonde, supra note 27, at 796–97.

187 Id.

188 See supra note 4 and accompanying text.
Of the two types of confusion identified in the Lanham Act, Coca-Cola would attempt to show confusion as to "the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." Although there are a number of factors that the court may consider in its fact-based inquiry, the core confusion factors would probably be determinative. For purposes of this discussion, assume Coca-Cola is suing Cola X, a hypothetical similar tasting cola beverage, for taste infringement.

Coca-Cola's mark is very strong, especially given its vast popularity around the globe. This factor favors Coca-Cola in finding a likelihood of confusion. The two goods, Coca-Cola and Cola X, are in close proximity because they are competing soda beverages bottled and sold in the United States, often next to one another in grocery and convenience stores. This factor also weighs in favor of Coca-Cola because there is a greater chance for confusion given the close proximity of the goods in the marketplace. Further, the taste marks are very similar in flavor, and thus more likely to confuse consumers. Finally, if the defendant intended Cola X to taste nearly identical to Coca-Cola for the purpose of exploiting Coca-Cola's customers, a likelihood of confusion will be found. Each of these core factors, though not exhaustive, weigh heavily in favor of Coca-Cola, resulting in a likelihood of confusion with the taste of Cola X.

The confusion at issue is not initial interest confusion or point-of-sale confusion. Although other cola beverages are shelved directly next to Coca-Cola in most retail locations, there is not likely to be initial interest confusion because all beverages distributed by a particular bottler are typically kept together in stores. Additionally, the packaging of Coca-Cola and other cola beverages is not likely to cause point-of-sale confusion because Coca-Cola cans are red with distinctive script.

The type of confusion that would support a taste infringement claim is post-sale confusion; after purchasing and consuming a similar-tasting cola beverage, customers are no longer sure what they are drinking. The problem with post-sale confusion in this context is that in the typical scenario, the buyer knows that the alleged infringer is the origin of the product. In the Coke Zero example,
however, consumers are unaware of the strikingly similar taste of Coke Zero until after the purchase has been completed because beverages are consumed post-purchase. Preventing post-sale confusion is consistent with the purposes of trademark protection because prohibiting confusingly similar taste marks allows Coca-Cola to control its own goodwill and reputation.

Coca-Cola will likely be able to show that the flavor of similar tasting cola beverages, like Coke Zero or Cola X, creates a likelihood of post-sale confusion among consumers. This showing will assist Coca-Cola in establishing a successful claim for taste infringement.

D. GRAPHICAL REQUIREMENT

Although trademarks used in commerce can be enforced without registration with the USPTO, Coca-Cola would likely seek to register the taste of its signature beverage if the registration requirements could be met, thus triggering the graphical depiction requirement. Because the drawing requirement is relaxed for other non-visual marks such as sound and scent, taste marks would likely be exempt because flavor is a non-visual mark that cannot easily be depicted on paper. Coca-Cola would instead be required to submit a detailed written description of the mark in order to secure trademark protection.

Capturing the flavor of Coca-Cola in a written description would be incredibly difficult. The taste of Coca-Cola is more complex than the product flavor described in Organon. If Coca-Cola was allowed to use broad, simplistic terms like “crisp,” “refreshing,” and “cola” in its written description, later enforcement of the taste mark would be extremely problematic. The dilemma is that taste transcends the English language, which fails to accurately capture the flavor using a limited selection of finite words.

Coca-Cola will likely be able to describe its flavor with sufficient detail to satisfy the USPTO’s graphical requirement, given its prior acceptance of “orange flavor” as a written description of a potential taste mark. Subsequent enforcement of the mark, however, will be very difficult based on the written description because on paper, many of the colas on the market can be described in virtually the same way.

193 See supra Part II.D.4.
194 See supra Part II.D.4.
195 See supra note 161 and accompanying text.
196 See In re N.V. Organon, 79 U.S.P.Q.2d 1639, 1640 (TTAB 2006) (stating the examining attorney accepted “orange flavor” as a sufficient written description of the taste seeking trademark protection).
197 See supra note 47 and accompanying text.
198 See In re N.V. Organon, 79 U.S.P.Q.2d at 1640.
E. TASTE MARK CHALLENGES AND PROPOSED SOLUTIONS

Taste marks present particular registration and enforcement problems for the TTAB, courts, and mark holders. The taste of Coca-Cola is substantially subjective, because a product's flavor is uniquely individual to the consumer. A number of factors influence the way a taste is perceived and recognized by each person: age, disease, and the temperature of the product. Because taste perception is highly subjective, examination for registration and enforcement proceedings would be troublesome.

The current procedure governing the registration of trademarks inadequately addresses the recent proliferation of non-visual marks such as taste marks. The classic requirements for trademark registration need to give way to a system requiring more specificity and precision. Such a change would effectuate the goal of trademark registration to provide notice, and prevent potential infringers from unnecessarily expending large sums of money developing the same mark.

These same problems are also present in the registration of scent marks. Technological advances have lessened the subjectivity found in scent mark registration. The USPTO could revise its procedures and require a sample of the flavor to be deposited upon registration of the mark. Perhaps a technology could be developed similar to the electronic nose to capture an objective representation of the flavor. An objective digital file would greatly enhance the ability of judges to determine whether a taste infringement suit has merit early in the litigation cycle. Additionally, Coca-Cola could provide samples of its trademarked flavor to those making requests through the USPTO. Although this could be costly, and the product is available for purchase elsewhere, this will provide notice to other potential applicants and likely deter would-be infringers.

IV. CONCLUSION

The idea of a lawsuit for taste infringement is a novel proposal, one which has validity in the current trademark regime given the proliferation of nontraditional trademarks. Upon closer look, however, Coca-Cola will likely not be able to prevail against a similar-tasting cola beverage and secure protection for its unique flavor.

199 See Clarke, supra note 72, at 131 ("The extreme subjectivity of flavor perception would make PTO examination of flavors—and any subsequent related litigation—difficult.").
200 Id.
201 See supra Part II.A.
202 See Churovich, supra note 72, at 313 ("[S]erious unanswerable questions will arise concerning infringement [of scent marks].").
203 See supra note 74 and accompanying text.
Taste mark protection is best suited for products not meant to be consumed—where the flavor is not functional because there is no competitive need for the taste. This same principle has been demonstrated in the denial of protection for scent marks for products like perfume that consist entirely of a particular smell. Without its unique flavor, Coca-Cola’s hallmark beverage would be valueless, thus the product flavor is functional.

Additionally, the current trademark regime is inadequate to address the registration and enforcement of marks consisting entirely of taste. Mechanisms will need to be developed to ensure that the subjectivity of taste and flavor perception does not prohibit the registration and enforcement of valuable, and otherwise enforceable, marks.

Finally, the trademark system is concerned with the ultimate benefit to consumers by avoiding confusion and reducing search costs. Prohibiting trademark protection for the taste of Coca-Cola’s beverage will allow other cola producers to create similar-tasting beverages without the fear of infringement liability. Allowing market competition in the soda industry will greatly assist consumers because they will get the benefit of lower prices, more choices, and better quality.

Coca-Cola’s fictional taste infringement lawsuit against the Coke Zero brand is precluded by the functionality doctrine and inadequate registration and enforcement mechanisms available for evaluating taste. Therefore, under the current trademark framework, the “eerily similar house” that Coke Zero has constructed will be allowed to stand alongside the Coca-Cola brand with no recourse for taste infringement.