October 1997

Tee'd Off - Golf Course Designers Score Double Bogey in Search for Protection of Their Hole Designs

Robert D. Howell

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl

Part of the Constitutional Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uga.edu/jipl/vol5/iss1/8

This Notes is brought to you for free and open access by Digital Commons @ Georgia Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ Georgia Law. Please share how you have benefited from this access. For more information, please contact tstriepe@uga.edu.
I. INTRODUCTION

Golf course designers and architects create some of the most original and aesthetically pleasing landscape designs in the world. Each hole design is a masterful combination of topography, vegetation, and imagination. Few people possess the necessary artistic ability to create and design such works of art. Jack Nicklaus, Robert Trent Jones, Alister Mackenzie, and Bobby Jones, just to name a few, are truly “masters” of the golf course architecture industry. Since so many hours of designing and planning go into each meticulous hole design, it is only natural that architects want to protect their masterpieces from being copied. The question is, how can they do so?

Golf’s popularity has grown rapidly within the last several years. Golf is now one of the most popular pastimes in this country. Latest counts reveal that there are currently more than 14,000 golf courses and 24.5 million golfers in the United States. With this tremendous increase in the number of courses being built, golf course architects need a way to protect their hole designs from being copied. This Note reveals the shortage of viable methods available to golf course architects who wish to protect their hole designs from unauthorized copying. While golf course designers may attempt several methods to achieve protection, none are helpful or available to most golf course architects.

---

1 Paul Hodge, Public Gets Chance to Comment on Golf Course Proposal, WASH. POST, Dec. 3, 1992, at V0.8 (reporting that the number of golfers in the United States has grown at an annual rate of 3.9% since 1987 which is double the previous growth rate and a dramatic increase over other sports like tennis and skiing).


3 James M. Lane, The Complete Golfer’s Almanac 1996 331 (1996) (reporting that there are 24,563,000 golfers and 14,000 golf courses in the United States).
II. SHORTCOMINGS IN THE AVAILABLE PROTECTIONS

A. COPYRIGHTING THE PLANS AND DRAWINGS

Golf course architects and designers may attempt to protect their hole designs by claiming copyright on the plans and drawings of the holes. Such plans and drawings are copyrightable under the Copyright Act of 1976, which defines copyrightable subject matter to include "pictorial, graphic, and sculptural works." These works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, charts, diagrams, models, and technical drawings, including architectural plans.

"Technical drawings" of golf course hole designs fit within the items described as copyrightable under the 1976 Act. In fact, the House Report that accompanied the 1976 Act clarified any ambiguities regarding drawings' inclusion stating that "[a]n architect's plans and drawings would, of course, be protected by copyright." Additionally, courts and commentators agree that architectural plans and drawings are copyrightable.

At first glance, copyrighting drawings and design plans of golf holes seems to be a viable method of protecting architects' golf hole designs. However, obtaining copyright protection for drawings and plans provides little or no realistic protection for the golf course architect. Surprisingly, prior to 1990, unauthorized construction

---

7 Id.
9 See Demetriades v. Kaufmann, 680 F. Supp. 658, 664 (S.D.N.Y. 1988) (holding that architectural plans, drawings, and models fit within the Copyright Act because they are expressions of ideas and are not "useful articles"). See generally MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[D][2][a]; David E. Shipley, Copyright Protection for Architectural Works, 37 S.C. L. REV. 393 (1986).
from copyrighted plans did not constitute infringement. Numer-
ous cases have held that simply copyrighting plans protects only
against copying of the plans themselves and does not preclude
copying of the actual structure. These cases reason that the
plans only represent the idea or expression of the structure and not
the structure itself. Section 102(b) of the Copyright Act also
adopts this view. The copyright owner of the plans holds only
a copyright in the expression (the plans) of the idea (building itself)
and does not have any copyright in the idea alone.

Copying a building by viewing it, or by any means
other than actually copying, or using, the plans,
therefore only constituted copying an ‘idea’. Repr
ducing a building by observing, measuring, drawing,
or photographing an existing building, without using
copyrighted plans, would be classified as non-infring
reversing reverse engineering. Only by copying plans could
one copy the expression within which those ideas
were embodied.

---

10 Winick, supra note 8, at 1609. This result was changed by Congress’s passage of The
Architectural Works Copyright Protection Act of 1990 (AWCPA). However, the AWCPA
applies only to “buildings” and not other two and three-dimensional objects such as golf
courses. See discussion infra part I.B.

construction of a building from unauthorized plans does not constitute copyright infringe
ment), rev’d, 842 F.2d 1292 (4th Cir. 1988); Imperial Homes Corp. v. Lamont, 458 F.2d 895,
899 (5th Cir. 1972) (stating that copyright in architectural plans does not “clothe their author
with the exclusive right to reproduce the dwelling pictured.”); Herman Frankel Org. v.
copyrighting plans, prevent the building of a house similar to that taught by the copyrighted
plans. One does not gain a monopoly on the ideas expressed in the copyrighted material by
the act of registering them for copyright.”); Winick, supra note 8, at 1609 n.53.

12 See Baker v. Selden, 101 U.S. 99 (1879) (holding that copyright protects only expression
and not the underlying ideas).

13 “In no case does copyright protection for an original work of authorship extend to any
idea, procedure, process, system, method of operation, concept, principle, or discovery,
regardless of the form in which it is described, explained, illustrated, or embodied in such

14 Winick, supra note 8, at 1609 n.53.

15 Winick, supra note 8, at 1609 n.53.
Therefore, golf course designers would essentially gain no real protection from claiming copyrighting on their hole design and course layout plans.

Any golf course architect who wishes to copy the hole designs of a competitor may do so by simply going to a competitor's course and photographing or videotaping the hole design and course layout. By constructing replicas of the competitor's holes from the photos or videotapes, an infringement of the copyrighted plans could be avoided completely because no use of the copyrighted material has occurred. So, while golf course design plans are copyrightable and course architects may feel protected by claiming copyright on their hole design plans, the designers essentially gain no practical protection.

B. CONGRESS'S PASSAGE OF THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT OF 1990 LENDS NO HELP

In 1990 Congress took a major step in protecting architectural structures by passing the Architectural Works Copyright Protection Act (AWCPA). This Act purported to resolve the aforementioned dilemma by extending copyright protection to the actual structure.

Section 703 of the AWCPA adds "architectural works" to the "works of authorship" list in § 102 of the Copyright Act of 1976. An "architectural work" is defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings." However, the AWCPA protects only the design of "buildings" and thus fails to protect many architectural works that are not classified as "buildings."

Interestingly, the original version of the AWCPA contained much broader protection for architectural works. The original draft

---

would have provided copyright protection to other “three-dimensional structures” including “cases where architectural works [were] embodied in innovative structures that defy easy classification.” This phrase was eventually deleted from the current Act because Congress feared that it would extend protection too far. “Interstate highway bridges, cloverleafs, canals, dams, and pedestrian walkways” were all items that the House Subcommittee feared would fit within the broader definition. Subsequently, the final version of the Act protects only a narrowly defined category of architectural subject matter.

“Golf courses, gardens, tunnels, bridges, overpasses, fences, and walls are only a few of the structures designed by architects that would not fit the common definition of ‘building.’” In order for golf courses or other architectural structures that are not “buildings” to qualify for copyright protection under the current version of the AWCPA, courts would have to strain the ordinary definition of “building.”

Regardless of how far courts are willing to stretch that term, it is not feasible for a golf course to ever constitute a “building” under the current Act. Therefore, even though Congress enacted the AWCPA, which provides protection for some architectural structures in addition to protection for the plans, Congress’ restriction of the new protection to “buildings” provides little hope for golf course architects seeking protection of their designs.

Indeed, a golf course more appropriately constitutes an “organization of space” rather than a building. Works like golf courses that are not enclosed by any structure, although perhaps requiring much time, effort, and expense to design, and having a large potential for copying, simply cannot be considered buildings. Unless Congress revises its definition of architectural works in §101, “only a distorted application of ‘building’ will protect these works.” So with no real protection available as an “architectural

20 Id.
22 Id.
23 Winick, supra note 8, at 1613.
24 Winick, supra note 8, at 1615.
25 Winick, supra note 8, at 1615.
work" under the AWCPA, golf course architects must seek protection for their course designs elsewhere.


Since golf course architects and designers cannot find any hope of protection under 17 U.S.C. § 101 and the AWCPA, the only other alternative for acquiring copyright protection of their course designs is under 17 U.S.C. § 102(a)(5) as a "pictorial, graphic [or] sculptural" work. Under this section, the insurmountable hurdle for course designers is having their golf holes satisfy the separability test for utilitarian objects.

In order to achieve copyright protection under 17 U.S.C. § 102(a)(5) as a "graphic" or "sculptural" work, an entire golf hole must be categorized as a non-useful article.26 Regardless of how aesthetically pleasing a golf hole may be, if the hole is a composition of purely utilitarian objects, the hole will not be afforded copyright protection. This section of the Copyright Act of 1976 defines a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."27 The 1976 Act further defines "pictorial, graphic, and sculptural works" to include:

works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.28

28 Id.
Golf holes can be correctly classified as artistic creations of landscape architecture. The courses' artistic nature is reflected in their beauty and design. "A good golf course grows on one like a good painting, good music, or any other artistic creation." All golfers would agree that courses such as Augusta National have hole designs that can perhaps only be described as works of "art". Classification as a form of "art", however, does little to advance a golf hole's chances of achieving copyrightability under this section.

1. The Utility Test. Section 102 presents two major hurdles that golf holes will have great difficulty overcoming. First, a golf hole cannot avoid being labeled and classified as a "useful" article. Golf holes are designed to be played by golfers. As such, their primary function is to be "used" for the purpose for which they were created and designed. While striking artistic beauty accompanies many of the world's best golf holes, the holes were not designed primarily for this purpose. Instead, course designers design golf holes to challenge, and often frustrate, the golfer. Since golf holes are designed primarily to be played, they are appropriately classified as articles "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Therefore, golf holes meet the definition of a useful article and can only be copyrighted to the extent that they satisfy the separability test.

2. The Separability Test. The second insurmountable hurdle for most golf holes in their quest for copyright protection under § 102 is the holes' inability to satisfy the separability test. Simply stated, the separability test allows only the nonfunctional elements of an

---

29 By His Design: Besides Designing Courses, Architect Alister Mackenzie was a Man of Letters - and Opinions, GOLF MAG., April 1, 1995, at 118 (quoting ALISTER MACKENZIE, THE SPIRIT OF ST. ANDREWS (Sleeping Bear Press eds., 1995)).

30 See L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117 (Fed. Cir. 1993) (deeming athletic shoes useful articles because designed to be worn); Fabrica, Inc. v. El Dorado, Corp., 697 F.2d 890, 893, 217 U.S.P.Q. (BNA) 698 (9th Cir. 1982) (classifying display folders as useful articles because their primary purpose was to display and advertise carpet samples); Norris Indus., Inc. v. Int'l Tel. and Tel. Corp., 696 F.2d 918, 922, 217 U.S.P.Q. (BNA) 226 (11th Cir. 1983) (classifying wire spoked wheel cover as a useful article because of its use as part of the wheel); Custom Chrome, Inc. v. Ringer, 35 U.S.P.Q.2d (BNA) 1714 (D.D.C. 1995) (holding that motorcycle parts were useful articles because the parts were used in operating the motorcycle).

article that is of a primarily utilitarian function to be eligible for copyright protection. In other words, if an article's overall function is primarily useful, only the elements of the article that are not functional can receive copyright protection.

Unfortunately for golf course architects, golf holes are composed almost exclusively of functional components. Items that are functional in nature are not eligible for copyright protection. An item is functional if it is essential to the product's use.

All golf holes have certain common items that are functional. For example, all holes have a green, fairway, tee-box, and most contain at least one bunker or sand-trap. While shapes and sizes of these features may vary, some form of these items is essential to the creation and design of every golf hole. Since all holes require the existence and use of some combination of these features, the features are functional ones. If Congress allowed one golf course architect copyright protection for these functional features, that architect would have a monopoly on the golf course design market.

The separability test does allow nonfunctional features copyright protection, but only to the extent that these features can be separated from the utilitarian aspects of the article. Courts are unsettled as to what degree of separation is required. The Second Circuit has used as many as three different tests in making this determination: (1) whether the article has a "primary ornamental aspect" that can be conceptually separated from its "subsidiary utilitarian function"; (2) whether the article's artistic features are necessary or inextricably intermingled with utilitarian features; and (3) whether the design elements show the designer's artistic judgment independent of the functional considerations. Regardless of which test a court may follow, most golf holes' features are not likely to meet the degree of separability required

---

32 Winick, supra note 8, at 1602 n.24; see Shira Perlmutter, Conceptual Separability and Copyright in the Designs of Useful Articles, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 339-41 (1990) (stating that the design of a useful article is eligible for copyright only to the extent that it can be identified separately from the article's utilitarian function).

33 This exclusion stems from fear that one party will monopolize a particular market due to exclusive rights to use an item that is essential in every product of a certain type.

34 Perlmutter, supra note 32, at 340.

35 Perlmutter, supra note 32, at 340-41.

36 Perlmutter, supra note 32, at 341.
to achieve copyright protection.

Some golf holes may have primarily ornamental features that can be separated from the feature’s utilitarian function. However, the converse is true for most golf hole features. For example, a certain picturesque lake, stream, or waterfall designed in a particularly aesthetically pleasing manner may, at first glance, appear to be primarily ornamental in nature. However, this same lake or stream also acts as a water hazard thereby serving an inseparable utilitarian function. Even the picturesque lighthouse at Harbour Town’s eighteenth hole serves the useful function of a landmark by which most players line up their tee shots. Therefore, golf hole features that appear to be merely ornamental can also serve useful functions. The dual ornamental/useful nature of most features existing on a golf course also shows that these features are necessary and inextricably intertwined with the useful features. Additionally, because most features serve both an artistic and useful function, golf course features do not reflect the course designer's artistic judgment independent of functional considerations. Therefore, the inability of golf course features to rid themselves of useful and functional qualities shows little promise for their ability to acquire the degree of separability necessary to receive any copyright protection.

Copyrighting a golf hole as a “pictorial, graphic [or] sculptural” work under 17 U.S.C. § 102(a) is not a feasible method of protection for golf course architects. While many golf holes contain beautiful artistic creations of landscape design, golf holes are useful articles that exist primarily to be played by golfers. As useful articles, the holes must undergo some test of separability before any feature of a golf hole can gain copyright protection. Since most hole features serve a dual purpose of ornamentation and usefulness, very few golf course features will acquire copyright protection. Thus, claiming

37 See Esquire v. Ringer, 591 F.2d 796, 199 U.S.P.Q. (BNA) 1 (D.C. Cir. 1978) (disallowing an entire article's design copyright protection no matter how aesthetically pleasing the design); Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411, 228 U.S.P.Q. (BNA) 385 (2d Cir. 1985) (holding that mannequins could not be copyrighted regardless of their aesthetically pleasing attributes because they were useful articles and had no features that could be separated from their usefulness); Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987) (denying bicycle rack that was originally created as a work of art copyright protection because of its usefulness as a bike rack).
copyright on a golf hole design under § 102 of the 1976 Copyright Act is not a viable means of protection for golf course architects to pursue.

D. FEASIBILITY OF A TRADE DRESS INFRINGEMENT ACTION UNDER THE LANHAM ACT

Golf course architects may seek some hope of protection by suing for Trade Dress Infringement under section 43(a) of the Lanham Act. While this method of protection may prove successful in some instances, it is difficult to establish and is practically unavailable for most golf course architects. Therefore, suit for trade dress infringement under the Lanham Act is not likely to be a viable means of protecting a golf course architect's designs.

1. Establishing an Action for Trade Dress Infringement. A trade dress infringement action involves a two-step analysis. First, a court must determine whether the plaintiff's trade dress qualifies for protection. This step requires examination of the following factors: (1) functionality, (2) distinctiveness, and (3) secondary meaning. If the court finds that these factors are met, then the court must decide whether an actual infringement has occurred. An infringement occurs only when there is a likelihood of confusion between the product or services of the plaintiff and the defendant.

a. Functionality. The functionality doctrine prevents one party from monopolizing as its trademark or trade dress a product feature or design that serves a primarily utilitarian purpose. Since functional features are required in the design of every product, functional trade dress is not protectable under the Lanham Act.

The Supreme Court has continually refined its definition of functionality over the years. In *Inwood Laboratories, Inc v. Ives* 38

40 Id.
41 Id.
42 Id.
Laboratories, Inc., the Court defined a functional feature or design as one that "is essential to the use or purpose of the article or [that] . . . affects the cost or quality of the article." This definition was expanded thirteen years later in Qualitex Co. v. Jacobson Products Co. There the Court held that functionality depends on (1) whether a product design or feature is essential to the use or purpose of the article, and (2) whether the plaintiff's exclusive use of the design would inhibit competition. As discussed above, golf courses as a whole are functional because they are designed to be played by golfers. Further, most individual features of golf courses would fit within the Supreme Court's definition of functional because the course features serve as useful and necessary features of a golf hole.

b. Distinctiveness. In addition to meeting the functionality requirement, trade dress must also be inherently distinctive. Trade dress meets the inherently distinctive definition if its "intrinsic nature serves to identify a particular source of a product." The Fifth Circuit refined this definition in Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc., stating "[i]f the features of the trade dress sought to be protected are arbitrary and serve no function either to describe the product or assist in its effective packaging," then the trade dress is inherently distinctive. "[T]rade dress may be (1) fanciful; (2) arbitrary; (3) suggestive; (4) descriptive; or (5) generic."

c. Secondary Meaning. Secondary meaning is acquired distinctiveness. The trade dress of a product achieves secondary meaning when the primary significance of the dress in the minds

---

45 U.S. 844 (1982).
46 Id. at 850-51 n.10.
48 Id. at 163.
49 See supra part II.C.
51 Id. at 768.
52 659 F.2d 695, 702, 212 U.S.P.Q. (BNA) 904 (5th Cir. 1981).
53 Id.
of consumers is not the product, but the source of the product. The key inquiry in determining secondary meaning is whether the consumers link the trade dress to a single source. The following factors are often used by courts to determine whether a design has achieved secondary meaning: (1) the amount and nature of advertising that emphasizes the design and its distinctive, identifying features; (2) consumer survey evidence linking the design and a single source; and (3) the defendant's intent in copying the design.

2. Golf Courses Designs Have Trouble Meeting the Trade Dress Requirements. The only case that deals with an attempt to extend trade dress protection to golf course design is Pebble Beach Co. v. Tour 18 I, Ltd. This case involved consolidated actions by three golf courses stating several claims under the Lanham Act including service mark infringement, unfair competition, false advertising, and trade dress infringement. The complaining golf courses also alleged claims under Texas law for common law unfair competition, conversion, civil conspiracy, and service mark and trade dress dilution under the Texas anti-dilution statute. This Note will focus only on the trade dress infringement and dilution sections of this case. All claims of unfair competition and service mark infringement deal primarily with infringing marks and not the hole designs themselves.

a. Background Facts. The plaintiffs in this case consist of three separate parties: Pebble Beach, Resorts of Pinehurst, Inc., and Sea Pines, Inc. Pebble Beach, a California partnership, owns and operates a golf and vacation resort in California that includes five golf courses: (1) Pebble Beach Golf Links; (2) The Links at Spanish Bay; (3) Spyglass Hill; (4) Peter Hay Golf Course; and (5)
Old Del Monte Golf Course. Resorts of Pinehurst, Inc., a North
Carolina corporation, operates a golf resort that includes seven golf
courses. Sea Pines, a South Carolina corporation, owns and
operates a golf and tennis resort called Harbour Town Golf Links
on Hilton Head Island.

The defendant, Tour 18 I, Ltd., is a limited partnership located
in Humble, Texas that owns and operates two golf courses, one
located in Humble and another in Flower Mound, Texas. Both
of Tour 18's courses consist of golf holes that have been copied from
famous golf courses throughout the country, including the plain-
tiffs'. At its Humble, Texas course, Tour 18 copied three holes
from the plaintiffs' golf courses: Pebble Beach Hole 14, Pinehurst
Course No. 2 Hole 3, and Harbour Town Hole 18. Also, Tour 18
replicated Harbour Town's Hole 18 at its Flower Mound, Texas
course.

Tour 18 carefully researched and planned the building of its
copied golf course. For two years the owners of Tour 18 traveled to
several golf courses to videotape the golf holes they had selected to
duplicate. The owners went to Pebble Beach in February 1991 and
videotaped the 14th hole without Pebble Beach's permission. Additionally, Tour 18 traveled to Harbour Town and Pinehurst to
videotape the 18th and 3rd holes, respectively. All of this videotap-
ing occurred without the permission or knowledge of the owners of
the courses that were copied. Apparently, Tour 18 took aerial

62 Pebble Beach, 942 F. Supp. at 1526-27.
63 Id. at 1527.
64 Id.
65 Id.
66 The following is a list of the golf holes that Tour 18 copied for its Humble, Texas
course: Hole # (1) Harbour Town #18 (Hilton Head Island, S.C.); (2) Bay Hill #6 (Orlando,
Fla.); (3) Pinehurst No. 2, Hole 3 (Pinehurst, N.C.); (4) Inverness #18 (Toledo, Ohio); (5)
Augusta National #11 (Augusta, Ga.); (6) Augusta National #12 (Augusta, Ga.); (7)
Augusta National #13 (Augusta, Ga.); (8) LaCosta #4 (Carlsbad, Ca.); (9) Sawgrass #17 (Ponte Vedra,
Fla.); (10) Desert Inn #10 (Las Vegas, Nev.); (11) Disney #6 (Orlando, Fla.); (12) Colonial #3
(Ft. Worth, Tex.); (13) Pebble Beach #14 (Pebble Beach, Ca.); (14) Oakmont #3 (Oakmont,
Penn.); (15) Shinnecock Hills #8 (Long Island, N.Y.); (16) Merion #11 (Philadelphia, Pa.); (17)
Oak Tree #8 (Edmund, Okla.); (18) Doral #18 (Miami, Fla.). Pebble Beach, 942 F. Supp. at
1532.
67 Id.
68 Id. at 1532.
69 Id. at 1532-33.
photographs and videos of each hole that they intended to copy.\textsuperscript{70}

Tour 18 then hired an engineering firm to create three-dimensional golf hole designs from their bootlegged videotapes and photos. Tour 18 also purchased maps of Pebble Beach’s Hole 14.\textsuperscript{71} Tour 18 used these blueprints generated from the tapes and maps to replicate the plaintiffs’ golf holes. The holes chosen for replication were chosen to coordinate with the landscape in Houston.\textsuperscript{72} Some of the holes were built around existing trees that looked similar to the ones located on the famous holes that were copied. However, most of the vegetation was imported. For example, to construct the “Amen Corner” of Augusta National, Tour 18 brought in and planted 2,000 azaleas, 400 crape myrtles, 400 dogwoods and truckloads of Georgia pine needles.\textsuperscript{73} Tour 18 even built a replica of the lighthouse present on Harbour Town’s Hole No. 18.\textsuperscript{74} Golfers who have played both the Tour 18 copied course and the originals say that most of its features are better than ninety-five percent accurate.\textsuperscript{75} Tour 18 has even gone so far as to copy the original holes’ mowing patterns for the greens and fairways.\textsuperscript{76}

Tour 18 aggressively marketed their courses and even advertised that their courses were compilations of “America’s Greatest 18 Holes.”\textsuperscript{77} In its advertisements, Tour 18 refers to its holes as “exact replicas, careful simulations,” and “painstaking re-creations” of the country’s best golf holes.\textsuperscript{78} In addition, Tour 18 used plaintiffs’ service marks, Pebble Beach, Harbour Town and Pinehurst and pictures of the lighthouse extensively in its advertising.\textsuperscript{79} Plaintiffs’ service marks are also used on Tour 18’s course signs and course materials including scorecards, yardage books, and

\textsuperscript{70} Counterfeit Golf, THE ECONOMIST, Feb. 20, 1993, at 94.
\textsuperscript{71} Pebble Beach, 942 F. Supp. at 1533. The maps used by Tour 18 concerning the Pebble Beach hole had been copyrighted. However, as noted above, this does not provide any real protection. See discussion supra part II.A.
\textsuperscript{72} Counterfeit Golf, THE ECONOMIST, Feb. 20, 1993, at 94.
\textsuperscript{73} Id.
\textsuperscript{74} Pebble Beach, 942 F. Supp. at 1533.
\textsuperscript{75} Counterfeit Golf, THE ECONOMIST, Feb. 20, 1993, at 94.
\textsuperscript{76} Id.
\textsuperscript{77} Pebble Beach, 942 F. Supp. at 1533.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
other written materials. 80

Tour 18 sought to preclude any possible infringements by placing disclaimers in much of its written material and on the sign in front of each Tour 18 golf hole. One of Tour 18's main arguments is that the disclaimers sufficiently preclude any confusion generated by copying plaintiffs' golf holes and using their service marks. 81 While Tour 18 has placed many disclaimers on its scorecards, yardage books, and hole signs, many advertisements in newspapers, magazines, and other trade publications contained no such disclaimers. 82

Tour 18 has enjoyed tremendous success since opening its copy-courses in Texas. In its first year of operations, Tour 18 cleared profits of over 1.7 million dollars on an initial investment of 5 million dollars. 83 Tour 18's courses consistently sell more rounds per year than other public courses in the Houston and Dallas areas. 84 Because of its overwhelming success, Tour 18 has plans to expand and build copy-courses at other possible cites in Arizona, Georgia, and Virginia. 85 Tour 18's success is directly attributable to its concept of copying the golf holes of other famous golf courses. 86

b. Trade Dress Infringement. The plaintiffs argued that Tour 18's copying of their golf holes and the Harbour Town lighthouse constituted trade dress infringement and unfair competition in violation of section 43(a) of the Lanham Act. 87 The Texas district
court noted that trade dress "embodies 'that arrangement of identifying characteristics or decorations connected to a product, whether by packaging or otherwise, intended to make the source of the product distinguishable from another and to promote its sale.' \(^{88}\) The court went on to note that the actual design or appearance of the product itself, rather than just the packaging, is protectable under the Lanham Act. \(^{89}\) "The trade dresses at issue in this case include the shapes of plaintiffs' golf holes, the length and width of the holes [and fairways], the placement and shape of sand and water hazards, the size and shape of the greens, the slope and elevation of the holes, and the golf hole's surrounding vegetation." \(^{90}\)

As noted above, a trade dress infringement claim involves a two-step process. The court must first decide whether plaintiffs' trade dresses qualify for protection. This depends on the following three issues: (1) functionality; (2) secondary meaning, and (3) distinctiveness. \(^{91}\)

i. Functionality. On the surface, this prong appears to be insurmountable for golf hole designers because all features found on a golf course are functional. Surprisingly, however, the Texas District Court found that golf hole designs are not functional. Tour 18 argued that the designs of the plaintiffs' golf holes are just arrangements of purely functional features and are therefore not worthy of trade dress protection. \(^{92}\) The court noted that by focusing on the functional nature of the individual features, Tour 18 focused on the wrong inquiry. \(^{93}\) Plaintiffs claimed as their identifying mark, not all holes with bunkers, but their particular arrangements of these functional features that constitute their hole designs. \(^{94}\) "Whether the configuration of [an article] is functional or can receive trademark protection depends on whether its design

---

89 Pebble Beach, 942 F. Supp. at 1555 (citing Duraco Prods., Inc. v. Joy Plastic Enters., Ltd., 40 F.3d 1431, 1438 (3d Cir. 1994)).
90 Pebble Beach, 942 F. Supp. at 1555.
92 Pebble Beach, 942 F. Supp. at 1555-56 (quoting Vaughan Mfg. Co. v. Brikam Intern., Inc. 814 F.2d 346, 350, 1 U.S.P.Q.2d (BNA) 2067 (7th Cir. 1987)).
93 Pebble Beach, 942 F. Supp. at 1555.
94 Id.
as a whole is superior to other designs, not on whether its component features viewed individually each have a function. Additionally, "a particular arbitrary combination of functional features, the combination of which is not itself functional, properly enjoys protection."

Focusing on golf holes in their entirety was the key to the finding of nonfunctionality for the Texas district court. An unlimited number of designs could have been used rather than plaintiffs' particular configurations. Additionally, the court noted that no evidence indicated that plaintiffs' particular designs were superior to any other designs and configurations.

The Texas district court buttressed its finding of nonfunctionality by pointing to evidence showing that it was unnecessary for Tour 18 to copy these holes to compete in the golf course market. These plaintiffs had not monopolized the golf course design market by utilizing these particular designs. Nothing precluded Tour 18 from constructing more challenging and possibly more aesthetically pleasing hole designs than those belonging to the plaintiffs. According to the court, this evidence supported the underlying rationale of the functionality requirement to protect against one designer monopolizing a particular market.

The functionality requirement did not give the Texas district court as much trouble as one might expect. The court simply chose to take a broad focus of a golf hole's design, rather than focusing on a hole's individual features. By focusing on the entire hole's configuration rather than its individual components, the Texas district court found that the functionality requirement can be successfully met. There is no question that bunkers, fairways, greens, tee boxes, and water hazards are all functional items that, alone, cannot be considered protectable trade dress. The Texas court, however, chose to shift focus away from the functional items to the items' arrangements. Only if other courts are willing to focus broadly like this one, will golf course architects encounter as

---

96 Pebble Beach, 942 F. Supp. 1555-56 (quoting Taco Cabana Int'l v. Two Pesos, Inc., 932 F.2d 1113, 1119 (5th Cir. 1991)).
97 Pebble Beach, 942 F. Supp at 1556.
98 Id.
little trouble meeting the nonfunctionality requirement of trade dress protection as these plaintiffs.

ii. Distinctiveness. If successful in showing that a golf hole design is nonfunctional, the course architect must still meet additional requirements.\(^9\) Perhaps the most troublesome requirement for golf course designers is the distinctiveness requirement. Almost all golf holes are compilations of the same features. All have a tee box, a fairway, and a green. Most holes include at least one bunker or other type of hazard. Thus, the distinctiveness prong of the trade dress test will be unachievable for most golf course architects.

In fact, the Texas district court agreed by finding that Pebble Beach's Hole No. 14 and Pinehurst's No. 2 Hole 3 were not inherently distinctive.\(^10\) To rise to the level of inherent distinctiveness, the golf hole would have to be so unique as to be identified with only one particular source.\(^11\) The plaintiffs in Pebble Beach tried to assert that their holes were inherently distinctive because no other golf holes in the world were identical to their golf holes. The Texas district court quickly rejected this argument. Pointing to much authority,\(^12\) the court concluded that just because "no other golf holes resemble or are designed exactly like plaintiffs' does not make the holes inherently distinctive."\(^13\) The court held that Pebble Beach Hole 14 and Pinehurst No. 2 Hole 3 were not so distinctive as to automatically identify their source. These holes simply do not have any distinctive features. The holes are just "variations on common designs already prevalent in the golf course industry"\(^14\) and are not suggestive of their source. The hole designs do not "suggest' anything to consumers other than that they are golf holes."\(^15\) The Texas district court

---

\(^9\) The course architect must still show that the hole design is sufficiently distinct, and that the design has achieved secondary meaning.

\(^10\) Pebble Beach, 942 F. Supp. at 1557.

\(^11\) Id. at 1556 (citing Taco Cabana, 505 U.S. at 768-69).

\(^12\) Duraco Prods., Inc. v. Joy Plastic Enters., Ltd., 40 F.3d 1431, 1447 (3d Cir. 1994); see Turtle Wax, Inc. v. First Brands Corp., 781 F. Supp. 1314, 1321 (N.D. Ill. 1991); 1 McCarthy § 8.02(4) (stating that simply because no similar articles exist, inherently distinct status is not automatically conferred).

\(^13\) Pebble Beach, 942 F. Supp. at 1557.

\(^14\) Id. at 1558.

\(^15\) Id.
concluded that these two holes were therefore merely descriptive and protectable only upon a showing of secondary meaning.\textsuperscript{106} Harbour Town Hole 18 was, however, successful in showing inherent distinctiveness.\textsuperscript{107} This hole, "because of its association with and incorporation of the lighthouse, contains arbitrary source-identifying features that make its design inherently distinctive."\textsuperscript{108} The hole, however, stands as an exception to the proposition that golf holes are not likely to achieve inherent distinctiveness.

The presence of the lighthouse in the background of Harbour Town's Hole 18 was the main reason this hole achieved this difficult distinct status. However, the Texas district court probably placed an excessive amount of weight on the presence of the man-made lighthouse. Distinctiveness should be measured through the impression made on the observer. "Man madness" should not matter here.

If an identifying mark needs to be man-made to achieve inherently distinct status, the court's protection will not reach very far. Very few courses are built with man-made structures, such as lighthouses, as their centerpieces and identifying marks. Golf holes are generally compilations of natural objects such as trees, grass, sand, and water. For example, it is uncertain after the Texas district court's decision whether a golf hole as famous as Pebble Beach's Hole 18, which hails as its centerpiece the Pacific Ocean, could achieve inherently distinct status. Although there is only one hole in the world like Pebble Beach's Hole 18, it does not have a man-made object as a distinguishing mark.\textsuperscript{109} If achieving inherent distinctiveness requires the presence of a distinguishing man-made object, as the Pebble Beach decision suggests, then very few holes will be able to meet this prong of the test. If future courts choose to follow the Texas district court's analysis here and do not focus on the impression made on the observer, most golf course architects will find that an "inherently distinctive" status is not achievable.

\textsuperscript{106} Id.
\textsuperscript{107} Because Harbour Town's Hole 18 achieved inherently distinct status, it was not necessary to establish that this hole had achieved secondary meaning.
\textsuperscript{108} Pebble Beach, 942 F. Supp. at 1556.
\textsuperscript{109} It is not likely, however, that Pebble Beach's Hole 18 could ever be truly replicated because of its location on the Pacific Ocean.
Additionally, most golf holes are not designed with a single distinct feature sufficiently identifying their source. For example, there may only be one golf hole in the world that has a huge cherry tree splitting the fairway. Yet, this tree, being a common feature found on many golf courses, will not be enough to qualify this hole as inherently distinct. The same holds true for a uniquely shaped green or bunker. Since greens and bunkers are found on all golf courses, this will preclude a hole from being inherently distinctive.

Perhaps courts should broaden their focus and take the same broad view that the Texas district court took with the element of functionality. By focusing on the entire golf hole, and not just its features, it is possible that a hole might be so uniquely designed as to be classified as inherently distinctive. So far, however, no court has chosen to broaden its focus in this manner. Therefore, while it is technically possible for a golf hole to achieve distinct status, the average golf hole does not have a very strong chance.

iii. Secondary Meaning. If a product is not classified as being inherently distinct, the product can only be protectable trade dress if it has achieved secondary meaning. The trade dress of a product achieves secondary meaning when "the primary significance of the dress in the minds of consumers is not the product, but the source of the product."\(^{110}\) The key inquiry is whether consumers connect the trade dress to a single source.\(^{111}\) Courts examine the following factors in determining whether a product has achieved secondary meaning: (1) amount and nature of advertising emphasizing the design and its distinctive identifying features; (2) consumer survey evidence linking the design and a single source; and (3) defendant's intent in copying the design.\(^{112}\)

(a). Advertising. The amount of advertising associating plaintiffs' trade dress to a single source is a relevant inquiry. Both Pebble Beach and Pinehurst produced evidence that they had extensively advertised their golf courses. However, very few of the


\(^{111}\) Pebble Beach, 942 F. Supp. at 1559 (citing Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768-69 (1992)).

\(^{112}\) Pebble Beach, 942 F. Supp. at 1559 (citing Duraco Prods., Inc. v. Joy Plastic Enters., Ltd., 40 F.3d 1431, 1452 (3d Cir. 1994); Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 795-96 (5th Cir. 1983)).
advertisements actually depicted the holes that were copied by Tour 18. Pebble Beach could not present even one advertisement of its course that depicted Hole 14. The court did suggest, however, that if extensive exposure of the holes in question had occurred as a result of television coverage, this might be enough to meet this factor of the secondary meaning test. Neither Pebble Beach nor Pinehurst could present any such evidence. Therefore, the district court determined that the Pebble Beach and Pinehurst holes had not been advertised in a manner that showed an association between the advertised trade dress and the source of the trade dress.

Most golf hole architects will not be able to show sufficient advertising to achieve secondary meaning. Many golf courses do not advertise as extensively as Pebble Beach and Pinehurst, both of which were unable to show sufficient advertising. According to this court's opinion, a golf course designer that wished his golf holes to achieve secondary meaning in order to receive trade dress protection would have to extensively advertise every hole on the course. Every hole would essentially have to be a signature hole. This view is impractical and virtually not achievable for most golf course designers and architects. Additionally, if a course designer must rely on television coverage to establish sufficient advertising, very few designers will be successful in seeing that their holes acquire secondary meaning because only a select few designers are fortunate enough to have televised golf tournaments hosted on their courses.

(b). Survey Evidence. "Survey evidence is the most direct and persuasive way of establishing secondary meaning." This type of evidence consists of consumer surveys that demonstrate that consumers actually link the product to a single source.

The district court for the Southern District of Texas cursorily stated that no plaintiffs in this case had presented any survey evidence to show that their holes have achieved secondary meaning. The court did not elaborate further.

---

113 Pebble Beach, 942 F. Supp. at 1559-60.
114 Id.
115 Id. at 1560 (citing Zatarains, 698 F.2d at 795).
116 Pebble Beach, 942 F. Supp. at 1560.
117 Id.
This prong also seems virtually not achievable for most golf course designers. With the exception of a few golf holes on courses in the world, it is unlikely that course designers could present sufficiently concrete survey evidence to establish that the public automatically associates a particular golf hole with a particular course and course designer. Moreover, the accumulation and presentation of such evidence would be very expensive, thereby foreclosing this evidence as an option for many course designers.

(c). Intent To Copy. Evidence of intentional copying does not automatically trigger a presumption of secondary meaning.118 Pebble Beach's Hole 14 and Pinehurst's Hole 3 were unsuccessful in their assertion that because Tour 18 intentionally copied their holes, the copied holes had achieved secondary meaning. The evidence presented in this case showed that these two holes had been copied because of their location on famous golf courses, not because the holes themselves were famous. These holes were copied because they belonged to famous courses and service marks.119

If a golf hole must first become "famous" enough for a competitor to intentionally copy it, many golf holes will be excluded from achieving secondary meaning. For example, a competitor may desire to copy a Jack Nicklaus hole design not because the hole itself is famous, but because it is a Jack Nicklaus design. Thus, a course designer such as Nicklaus could not adequately protect all of his hole designs from being copied. Protection would only potentially be available for those holes that had become famous. While golf is gaining popularity, there are relatively few holes in the world that would qualify as truly "famous."120 Yet, many golfers would play courses simply because they knew the holes had been designed by a famous golf course designer. Therefore, requiring a hole first to be famous enough to be intentionally copied does not provide adequate protection for course designers to protect all of their hole designs.

119 Pebble Beach, 942 F. Supp. at 1560.
120 For example, the hole commonly referred to as the Postage Stamp on St. Andrews is one golf hole that has achieved world-wide fame.
Because of the difficulty of compliance with any of these factors, most golf holes will not be able to achieve secondary meaning status. The District Court in *Pebble Beach* agreed by stating that "proving secondary meaning for plaintiffs' golf holes is particularly difficult since an individual golf hole is only one of the eighteen holes that make up an entire course." The court went on to note that each plaintiff in this case has eighteen separate trade dresses. "Thus, it is difficult to demonstrate that consumers recognize and associate one particular golf hole from an entire course with the source of the hole."

3. Likelihood of Confusion. As the only golf hole having been successful in establishing trade dress status, Harbour Town's Hole 18 is the only hole that reached the question of likelihood of confusion. The factors relevant to this determination are as follows: "(1) the type and strength of plaintiff's trade dress; (2) the degree of similarity between plaintiff's and defendant's trade dress; (3) the similarity between plaintiff's and defendant's goods or services; (4) the identity of plaintiff's and defendant's customers; (5) the similarity of plaintiff's and defendant's advertising; (6) the defendant's intent; (7) the existence of actual confusion."

The district court for the Southern District of Texas found that likelihood of confusion did exist as to Harbour Town's Hole 18. The court noted that the existence of the lighthouse was a "strong, distinctive identifier of source for Harbour Town Golf Links." Evidence that suggested that Tour 18 intentionally copied this hole and the lighthouse also pointed to a finding of confusion.

---

121 *Pebble Beach*, 942 F. Supp. at 1560.
122 Id.
123 Id. It is worth noting that Harbour Town's Hole 18 did achieve secondary meaning. However, this determination by the court was not necessary since the court had already found that the hole was inherently distinctive. The court concluded that Harbour Town's Hole 18 had been extensively exposed in advertising, including television advertising during golf tournaments. *Id.* at 1559-60. Additionally, Harbour Town produced evidence to show that Tour 18 had intentionally copied this hole because the hole itself was a famous one. *Id.* at 1560.
124 *Id.* at 1561 (citing *Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113, 1122 (5th Cir. 1991)).
125 *Pebble Beach*, 942 F. Supp. at 1561.
126 Id.
127 Id.
The key inquiry here is whether Tour 18’s copying of plaintiffs’ trade dress resulted in actual confusion as to source. The court found that actual confusion existed. Sea Pines pointed to evidence showing that golfers, after playing a round on a Tour 18 course, were actually confused into believing that Tour 18 had received permission from Harbour Town to replicate its golf hole design. Tour 18 fought this actual confusion evidence by arguing that it is virtually impossible that a golfer playing a round of golf in Texas would be actually confused into thinking he was playing the actual hole at Pebble Beach or otherwise. The court criticized this argument for being too narrow. Likelihood of confusion exists when a consumer is likely to be confused as to the source. The confusion problem arises when Tour 18’s patrons are “confused” into believing that the golf holes were duplicated with the plaintiffs’ permission.

Since Harbour Town’s Hole 18 was the only hole successful in establishing trade dress, it was the only hole that received any protection from this court. Therefore, the court found in favor of Sea Pines on its trade dress infringement claim pursuant to section 43(a) of the Lanham Act. Pebble Beach’s Hole 14 and Pinehurst’s Hole 3, however, unfortunately received no protection. Pursuant to the findings of this court, these holes are apparently free to be copied at will.

E. FEASIBILITY OF A SUIT FOR VIOLATION OF AN ANTI-DILUTION STATUTE

Golf course designers and architects can try to sue for dilution of their golf holes’ trade dresses under federal or state anti-dilution statutes. The purpose of an anti-dilution statute is to preclude the “whittling away” of a party’s distinctive trademark or trade

\[128\] Id.
\[129\] Id. at 1541.
\[130\] Id.
\[131\] Id.
\[132\] Id.
\[133\] Id.
name. Anti-dilution statutes have been held to apply “with equal force” to protection of trade dress. To establish a dilution claim, a plaintiff must show (1) ownership of distinctive dress, and (2) likelihood of dilution. A likelihood of dilution can be shown under either of two separate theories: dilution by “tarnishment”, and dilution by “blurring.” Dilution by “tarnishment” occurs when a trade dress is “linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context” such that “the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods.” Dilution by blurring occurs when “[c]ustomers or prospective customers . . . see the plaintiff’s mark used on a plethora of different goods and services.” Dilution by blurring “refers to a loss of distinctiveness, a weakening of a mark’s propensity to bring to mind a particular product, service, or source of either.”

For a golf course architect to seek protection of hole designs under an anti-dilution statute, the designer must first show that his trade dresses are distinctive. Golf hole designers run into the same problems here in establishing distinctiveness as are encountered in establishing a trade dress infringement claim under the Lanham Act. As noted above, achieving distinctiveness for most golf holes is virtually impossible since most golf holes are compilations of non-distinct features. Being unable to achieve distinct status, most golf holes will not be successful in seeking protection under anti-dilution statutes.

137 Hormel Foods, 73 F.3d at 506.
141 Harbour Town’s Hole 18 is the only hole that has ever attempted to achieve distinct status and been successful. Pebble Beach, 942. F. Supp. at 1567.
III. CONCLUSION

Golf is currently one of the most popular sports and pastimes of millions of Americans. The sport has grown rapidly in popularity over the past several years. Due to this increased interest in the game, more and more golf courses have sprung up around the country. Gifted golf course architects spend many painstaking hours to design and create their masterpieces. These course designs and creations are a result of much time, effort, and expense. Designing and constructing a golf course can easily cost hundreds of thousands, if not millions, of dollars. Additionally, a course designed by a famous architect can draw quite a crowd of interested golfers, and be a very lucrative business, potentially generating millions of dollars in revenue. Yet, course architects really have no viable means of protecting their works from being copied by others.

Claiming copyright on the golf hole design plans under § 101 of the 1976 Copyright Act is a popular choice for most golf course architects. However, this practice provides the designers with little or no real protection. Nothing prevents a competitor from copying and constructing the holes without using the copyrighted plans. Additionally, copyrighting the plans does not give the course architect any exclusive right to construct the ideas expressed in his plans. While this method of alleged protection may provide some piece of mind to the golf architects of the world, in reality, this practice provides no real protection from course pirates.

Congress' passing of the AWCPA in 1990 did not lend any help to the golf course architect's dilemma. The limited wording of the AWCPA to include actual structures within the realm of copyrightable material restricts the Act's application to any structure not falling within the definition of a "building." Congress had its chance to expressly include golf courses within the purviews of this Act. However, Congress decided that extending protection to structures that were not enclosed and did not classify as "buildings", would extend copyright protection too far. So, out of Congress' fear of extending copyright protection too far, came another blow for golf course architects who wished to find some real protection for their course creations.

Claiming copyrighting on the golf hole itself under § 102 of the Copyright Act of 1976 is not a viable method of protection either.
Golf courses undoubtedly classify as “useful articles” and must therefore undergo application of the separability test. The application of this test sounds the death knell for most golf holes. Since almost all golf holes are comprised of functional items that cannot be separated from the overall utilitarian aspects of a golf hole, very few, if any, features of a golf hole will be afforded copyright protection. There may be, however, some holes that could achieve protection for a certain feature that served no useful purpose. Notwithstanding, the converse is true for most golf holes because even seemingly ornamental features actually serve functional purposes. Therefore, copyrighting a golf hole or its features under this section is not feasible.

Since golf hole designs are valuable pieces of intellectual property by which many entrepreneurs generate great profits, these designs arguably should receive some copyright protection. Perhaps it is time for Congress to amend the AWCPA to specifically include golf courses so that a course would not be excluded by the narrow definition of “buildings.” Perhaps courts should take it upon themselves to liberally interpret the AWCPA’s definition of a “building” to include golf courses. However accomplished, golf courses should be entitled to receive some real protection.

Suing a competitor who has copied a golf hole design for trade dress infringement under § 43 of the Lanham Act gives golf course architects little assurance either. While technically, this type of action could be successful,142 most golf holes do not possess the distinctiveness or level of fame necessary to establish the golf hole as protectable trade dress. While the Texas district court circumvented the functionality barrier by focusing on a golf hole’s design in its entirety, the distinctiveness and secondary meaning requirements wreak havoc on golf holes attempting to establish an action for trade dress infringement. Since almost all golf holes are compilations of common features, it will be very difficult for a hole to establish a level of distinctiveness that will serve as an indicator of source. Also, the extremely high level of advertising, frequent lack of

142 Remember that Harbour Town’s Hole 18 was successful in establishing an action for trade dress infringement. This was due in large part to the existence of the lighthouse. This successful case should, however, be regarded as an exception.
helpful survey evidence, and the high level of fame required before a golf hole can have secondary meaning will exclude most golf holes from protection. If every golf hole has to be extensively advertised and be very famous before receiving protection, most golf holes will be excluded. Perhaps courts should lower these standards to include more golf holes within the realm of protectable trade dress.

Finally, golf course architects find no relief by appealing to anti-dilution statutes. The insurmountable hurdle of distinctiveness acts as a bar to most golf holes here as well. Most holes simply are not designed to be so distinct that they automatically identify their source. Therefore, golf course architects will find little help from the anti-dilution statutes.

Because of golf’s increase in popularity, the sport has become big business in this country. Some golf course designers are truly blessed with an artistic and creative talent to create beautiful courses. No reason exists why these golf hole designs should be open to copying at will by competitors without duly compensating the architects. Currently, however, little or no protective mechanisms are in place to prevent this pirating of golf hole designs from occurring.

ROBERT D. HOWELL