
The Relevance of Alternative Designs 16 Years After *TrafFix*

AUGUST 3, 2017

In this article written by [Vinita Ferrera](#), [Aaron Macris](#) and [Jeffrey Olshan](#), published in Bloomberg BNA's *Patent, Trademark & Copyright Journal*, authors discuss the many interpretations of *TrafFix* on alternative designs and provide guidance for litigants as such evidence can have a substantial impact in trade dress litigation. Dealing with it effectively requires an understanding of how courts differ in their treatment of alternative design evidence and the nuanced ways it can be used.

In 2001, the Supreme Court in *TrafFix Devices, Inc. v. Marketing Displays, Inc.* refined its test for determining whether a product design is functional—and thus ineligible for trade dress protection. 532 U.S. 23, 58 U.S.P.Q.2d 1001 (2001). In doing so, the Court addressed one factor commonly considered by lower courts analyzing functionality: the availability of alternative designs. *Id.* at 33-34. Generally, evidence that a product feature can be designed in different ways supports the argument that each of those designs is not functional. However, the Court in *TrafFix* seemed to downplay the significance of such evidence, stating that in light of other indicia of functionality—in that case the existence of an expired utility patent—there was no need "to engage . . . in speculation about other design possibilities." 523 U.S. at 33-34. [Read the full article.](#)

Authors



Vinita Ferrera

PARTNER

 vinita.ferrera@wilmerhale.com

 +1 617 526 6208