

The Cutest Trademark Dispute— Squishmallows Takes on Skoosherz

By Elizabeth J. Rest

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As the old saying goes, “functionality killed the trade dress.” OK, that’s not actually a saying, but it should be. Lawsuits pitting one plush toy against another have brought trade dress law to the forefront. At the heart of the battle is whether there are protectable nonfunctional elements in Kelly Toys’ Squishmallows such that Build-A-Bear’s use of similar elements in its Skoosherz constitutes trade dress infringement.

Trade dress is the design and shape of product packaging, or the design and shape of the product itself, i.e., its configuration. U.S. trademark law protects trade dress if it serves the same source-identifying function as a trademark and is not functional. [Section 2\(e\)\(5\) of the Lanham Act](#) prohibits registration on the Principal Register of “matter that, as a whole, is functional.”

In simplest terms, the functionality doctrine states that functional product features cannot serve as a trademark. However, nothing in the law is simple. Trade dress is examined for two types of functionalities: utilitarian and aesthetic. The [primary test](#) for utilitarian functionality is whether a feature is essential to the use or purpose of the article; or whether a feature affects the

cost or quality of the product. [The Federal Circuit and USPTO also consider](#): the existence of a utility patent that discloses the utilitarian advantages of the design; advertising materials that tout the design’s utilitarian advantages; the availability to

competitors of alternative designs; and whether the design results from a comparatively simple or inexpensive method of manufacture. Aesthetic functionality exists when a design feature makes a product more desirable and confers a significant benefit that cannot practically be duplicated by the use of alternative designs, thereby putting competitors at a significant disadvantage.

A great example of trade dress is the iconic shape of the Coca-Cola® bottle, which identifies the source of the product and serves no functional purpose.

Kelly Toys Holdings, LLC and its related entities have filed multiple lawsuits against Build-A-Bear Workshop, Inc. and its manufacturers and sellers, for example, in the [Central District](#)



Elizabeth Rest of Crown, LLP.

Courtesy photo

of California, alleging, among other things, that Build-A-Bear's Skoosherz plush toys violate the unregistered trade dress in the Squishmallows plush toys, the adorable and incredibly popular egg-shaped stuffed animals that were introduced in 2016 and have become a coveted collector's item.

In January 2024, Build-A-Bear announced the release of its Skoosherz toys, which, according to Kelly Toys, have the same trade dress as Squishmallows, "including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and velvety velour-like textured exterior," as illustrated below:

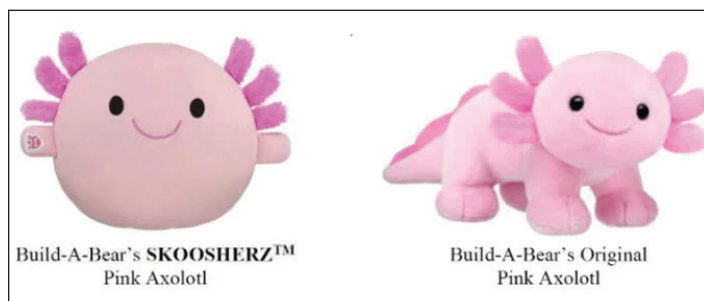


Squishmallows are shown.

Kelly Toys' also alleges that because consumers often refer to Squishmallows as "Squish," Build-A-Bear named its toys the similar sounding Skoosherz to associate them with Squishmallows, and uses the word "squish" in advertising to trick consumers into buying its products instead. Further, the Complaint asserts that Skoosherz, which are purchased pre-made, are a departure from Build-A-Bear's established

business model that allows consumers to make customizable toys, thereby trading off the goodwill of Squishmallows by marketing and selling "copycat products."

In response to the Kelly Toys' litigation, Build-A-Bear filed a declaratory action lawsuit asking the court to confirm that Kelly Toys' alleged trade dress in the Squishmallows is invalid, and that Skoosherz is its own version of a popular toy style and not an infringement. Build-A-Bear asserts that its Skoosherz were created to be "huggable" and are based on some of their original, most popular designs, for instance:



Squishmallows are shown.

Build-A-Bear's complaint asserts that Kelly Toys does not use the Squishmallows features as a source identifier, a requirement for all trademarks, and that the features are merely product design "aimed to aesthetically appeal to consumers," in other words, functional. Build-A-Bear alleges that the Squishmallows do not have the consistent overall look required for trade dress protection, and, as examples, points to different snout designs, varying coloring, and dissimilar eyes, bellies, and appendages among the Squishmallows line of products. Build-A-Bear asserts that that if Kelly Toys was granted the exclusive use of the Squishmallows trade dress, it would put competitors such as itself at a significant disadvantage "with regard to generic, functional,

and non-source identifying features” and make it difficult for competitors to create alternative designs. It argues that Kelly Toys’ claims are so broad that they would prohibit any toy maker from selling pillow-like plushies, thereby unfairly limiting competition.

The similarity of the Squishmallows and Skoosherz designs is clear, however, many toy companies sell stuffed plushies that are softer and rounder than traditional stuffed animals, making them easier to hug or use as a pillow. Thus, the question is whether Kelly Toys owns the specific, though unregistered, trade dress in the Squishmallows, and whether the Skoosherz are a copy. To succeed, Kelly Toys has the difficult burden of proving that its designs serve as a source identifier and are not functional.

A win for Kelly Toys would not prohibit other toy companies from manufacturing plush toys, but it would limit competitors’ ability to make cuddly, round, pillow-like toys with the precise Squishmallows design features lauded by Kelly Toys. Alternatively, a win for Build-A-Bear would mean any toy company could make a plushie with the same aesthetically functional features as the Squishmallows, so long as there was no source confusion.

Advising consumer brands on the protectability of trade dress is challenging and requires analysis of tenets of trademark law, such as source identification and likelihood of confusion, as well as consideration of functionality. This includes examining manufacturing practices, reviewing any advertising publicizing the benefits of the functional aspects of a product, and inquiring whether the client has sought a utility patent.

The trademark functionality doctrine is muddled, and courts themselves differ in its application, making the outcome of the Squishmallows v. Skoosherz fight impossible to predict. Either way, a decision in this dispute may provide some clarification regarding the protectability of unregistered trade dress and the functionality doctrine.

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