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ANALYSIS OF PROTECTION OF TRADE DRESS IN INDIA

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ABSTRACT

In today's world, where brands speak louder than ever before, the look and feel of a product, its trade dress, has become an invaluable asset. From the distinctive packaging of a soft drink bottle to the unique layout of a retail store, trade dress helps businesses stand out in a cluttered marketplace. However, as branding grows more visual and experiential, so does the risk of imitation, making the legal protection of trade dress all the more critical. This paper takes a deep dive into the concept of trade dress and its protection under intellectual property law.

This study begins by laying the groundwork, defining trade dress, exploring its origin, and tracing how it evolved in India. It closely examines the legal frameworks that govern trade dress protection by study different judicial proceedings. By looking into how the criteria for registration, scope of protection, enforcement mechanisms, and judicial interpretations is handled. Also, by pointing out certain limitations and challenges in protecting trade dress in india, the paper brings into focus how the legal system approaches the subject.

KEYWORDS: TRADE DRESS, INTELLECTUAL PROPERTY, TRADEMARKS ACT 19

INTRODUCTION

In today's competitive marketplace, a brand's identity is no longer defined by just its name or logo. The way a product looks, its shape, colour scheme, packaging, and even the layout of a store, can become just as important in distinguishing one brand from another. This unique visual identity, referred to as "trade dress," plays a vital role in influencing consumer choice and building brand recognition. While this concept has long been recognised in jurisdictions like the United States, its understanding and legal protection in India has developed more gradually, weaving itself into the broader fabric of trademark and intellectual property law. The

legal framework governing trade dress in India is still evolving, as it tries to balance innovation, fair competition, and consumer protection in an increasingly globalised economy.

India, with its rapidly growing consumer market and entrepreneurial ecosystem, has witnessed a significant increase in the importance of brand identity. As businesses seek to distinguish themselves in crowded markets, the aesthetic aspects of products have gained prominence¹. Packaging, product design, colours, and presentation are no longer merely functional; they have become carriers of brand personality. Consumers often associate a certain visual appearance with the reputation and quality of a brand, making the protection of trade dress not just a legal concern but a commercial necessity. Yet, despite its significance, trade dress does not have an explicit statutory definition in Indian law, unlike in some foreign jurisdictions. Instead, it is accommodated within the framework of the Trademarks Act, 1999, interpreted and applied through judicial rulings and administrative practice.

The Trademarks Act, 1999 marked a pivotal moment in India's intellectual property landscape. Although it does not directly mention "trade dress" as a distinct category, it does allow for the registration and protection of the shape of goods, packaging, and combinations of colours as part of the broader definition of a trademark². This has opened the door for trade dress elements to be recognised and enforced under Indian law. However, unlike the more structured and codified approaches seen in countries like the United States, India relies heavily on judicial interpretation to define the scope and limits of trade dress protection. As a result, Indian courts have played a central role in shaping this area of law, often borrowing from international jurisprudence while tailoring principles to suit domestic realities.

One of the most notable features of the Indian legal system in this context is its responsiveness to market dynamics and evolving business practices. Indian courts have increasingly acknowledged the role of trade dress in creating brand value and preventing consumer deception. Judgments have consistently reinforced the idea that trade dress, even when not registered, can be protected under the principles of passing off, a common law remedy aimed at preventing unfair competition. This recognition offers some comfort to businesses that may not yet have formal trademarks but have invested in establishing a unique visual identity.

¹ Prashant Reddy T. & Sumathi Chandrashekar, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* 154–55 (OUP 2017)

² Trade Marks Act, 1999, § 2(1)(zb)

However, this reliance on passing off rather than statutory registration can also introduce uncertainty, particularly for smaller businesses that may lack the resources to engage in prolonged legal battles³.

Another layer of complexity arises from the fact that trade dress elements often overlap with functional features of a product. The Indian legal framework, like its international counterparts, must draw a clear line between what is purely aesthetic and what serves a functional purpose. This distinction is crucial because the law does not permit monopolisation of functional product features under the guise of trade dress. Determining this balance requires careful judicial scrutiny and often depends on the specific facts of each case. As such, trade dress claims must be backed by strong evidence showing distinctiveness and the likelihood of consumer confusion in the absence of protection.

The emergence of global brands and the rise of digital commerce have further amplified the importance of having a robust trade dress protection regime in India. With international companies entering the Indian market and local brands expanding abroad, the need for alignment with global intellectual property standards has never been greater. India's participation in international treaties such as the TRIPS Agreement has prompted greater attention to the consistency and adequacy of its IP laws. While India is under no obligation to provide specific protection for trade dress, TRIPS does require members to protect the overall appearance of a product where it functions as a source identifier⁴. This has pushed Indian law, albeit indirectly, toward recognising and enforcing trade dress rights in practice, even if not explicitly mentioned in legislation.

Despite these advancements, challenges remain. The lack of a clear statutory definition of trade dress often leads to interpretational ambiguity. Businesses and legal practitioners must rely on precedents and inferred principles, which can vary between cases. Moreover, administrative mechanisms for registering and enforcing trade dress rights are still developing, and there is a need for greater clarity in examination guidelines and registry practices. Education and awareness are also key, many small and medium-sized enterprises (SMEs) may not even realise that their product packaging or design can be protected under intellectual property law⁵.

³ N.S. Gopalakrishnan & T.G. Agitha, *Principles of Intellectual Property* 210 (Eastern Book Co., 2nd ed. 2014)

⁴ World Trade Organization, Overview: The TRIPS Agreement, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

⁵ N.S. Gopalakrishnan & T.G. Agitha, *Principles of Intellectual Property* 214 (2nd ed. 2014)

Without widespread understanding, the practical benefits of trade dress protection may remain limited to larger corporations with legal expertise.

In light of these realities, the protection of trade dress in India presents a fascinating intersection of law, business, and consumer psychology. It reflects how the legal system is being shaped by commercial needs and global trends, even as it seeks to retain its unique domestic character. There is growing recognition of the role that non-conventional marks play in branding and consumer decision-making, and Indian law is gradually adapting to accommodate these changing norms. However, to fully realise the potential of trade dress protection, there is a pressing need for clearer statutory provisions, improved administrative processes, and greater judicial consistency.

This chapter will explore the current legal framework for trade dress protection in India, examining both statutory provisions and judicial interpretations. It will analyse how trade dress has been treated in case law, what standards are applied for distinctiveness and functionality, and how these compare with international approaches.

DEVELOPMENT OF TRADEMARK LAW IN INDIA

In a market as vibrant and diverse as India, the way businesses identify themselves has always mattered. Over time, a simple name or logo evolved into something much more powerful, a symbol of trust, quality, and customer loyalty. As businesses began to realise the immense value of their identity in distinguishing their products and services, the need for a legal mechanism to safeguard these identifiers became evident. This is where trademark law stepped in, evolving hand-in-hand with India's changing commercial landscape.

1. COLONIAL BEGINNINGS

The roots of trademark law in India can be traced back to the British era. During colonial rule, the first formal legal effort to deal with trademarks came in the form of the Trade Marks Act of 1940⁶. It was largely influenced by the English Trade Marks Act of 1938 and was introduced to cater to the growing need for protecting brand names and logos as commerce expanded⁷. However, this law was limited in scope and was more suited to British industrial conditions than India's evolving socio-economic environment.

⁶ *The Trade Marks Act, 1940* (Act V of 1940)

⁷ V.K. Ahuja, *Law Relating to Intellectual Property Rights* 470 (3rd ed. 2021)

Before the 1940 Act, protection was largely based on common law principles of passing off. This meant that a business could take legal action if someone misrepresented their goods or services in a way that caused damage to the business's reputation. While this provided some level of remedy, it lacked structure and consistency, and did not offer a formal system of registration or enforcement.

2. THE TRADE AND MERCHANDISE MARKS ACT, 1958: A NEW BEGINNING

Recognising the limitations of the earlier law, India introduced a more comprehensive piece of legislation, the Trade and Merchandise Marks Act, 1958⁸. This was a landmark development as it laid down a proper framework for registration, protection, and enforcement of trademarks in India. It was more in tune with India's industrial development post-independence and introduced clearer provisions around what constituted a trademark, how it could be registered, and what rights it conferred upon its owner.

Importantly, this Act maintained the dual protection approach by preserving the common law remedy of passing off while simultaneously offering statutory protection to registered trademarks. This duality continues to play a major role in Indian trademark jurisprudence even today.

3. THE TRADE MARKS ACT, 1999: MODERNISING INDIAN TRADEMARK LAW

By the late 1990s, it was clear that Indian trademark law needed another upgrade. With the rise of globalisation and the digital economy, branding became more complex and crucial than ever before. India had also signed the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement⁹ under the World Trade Organization (WTO) in 1995. This necessitated a complete overhaul of its existing IP regime to comply with international standards.

Thus came the Trade Marks Act, 1999, which repealed the 1958 Act¹⁰. This Act was a modern, forward-looking piece of legislation, aligned with global norms and designed to protect both traditional and non-traditional trademarks. One of the most significant aspects of this Act was the expansion of the definition of a trademark. For the first time, it recognised shapes, packaging, and combinations of colours as registrable marks, paving the way for the future recognition of non-traditional trademarks (NTTs) in India¹¹.

⁸ The Trade and Merchandise Marks Act, 1958 (Act 43 of 1958) (repealed)

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 15–16, Apr. 15, 1994

¹⁰ The Trade Marks Act, No. 47 of 1999

¹¹ The Trade Marks Act § 2(1)(zb)

This Act also established the Trademark Registry as a more structured institution and introduced the Appellate Board for handling disputes. Furthermore, it enhanced the period of trademark registration to ten years, renewable indefinitely, thereby offering long-term protection to brands.

4. JUDICIAL INTERPRETATIONS AND THE ROLE OF COURTS

While statutory development is crucial, Indian courts have played an equally important role in interpreting and expanding the scope of trademark protection. Over the years, courts have delivered landmark decisions reinforcing the significance of distinctiveness, brand reputation, and the likelihood of confusion in deciding trademark disputes.

The judiciary has also been instrumental in expanding protection to unregistered marks through the common law action of passing off, showing that Indian trademark law, though statutory in nature, continues to honour equitable principles. Courts have taken a progressive stance in recognising trade dress, colour marks, and even sound marks in certain cases, thereby subtly integrating NTTs into the legal framework even in the absence of express statutory provisions¹².

5. THE INFLUENCE OF INTERNATIONAL AGREEMENTS

India's commitment to various international treaties and conventions, such as the Paris Convention and the Madrid Protocol, has also shaped its trademark law¹³. These agreements have encouraged harmonisation with global standards and provided mechanisms for international registration of trademarks. The Madrid Protocol, in particular, made it easier for Indian businesses to seek protection in multiple countries and vice versa¹⁴.

India's compliance with the TRIPS Agreement further demanded that its IP laws meet minimum standards for protection and enforcement¹⁵. This led to not only the enactment of the 1999 Act but also consistent efforts to strengthen trademark infrastructure, streamline processes, and make the law more accessible and efficient.

6. A STEP TOWARDS RECOGNISING NON-TRADITIONAL TRADEMARKS

Although non-traditional trademarks are not yet fully codified under Indian law, the seeds have

¹² *Colgate Palmolive Co. v. Anchor Health & Beauty Care Pvt. Ltd.*, 2003 (27) PTC 478 (Del)

¹³ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305

¹⁴ Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, as revised and amended by the Protocol Relating to the Madrid Agreement, June 27, 1989

¹⁵ TRIPS Agreement, arts. 15–16, Apr. 15, 1994

already been sown. The inclusion of shapes, colours, and packaging in the definition of trademarks under the 1999 Act signals a clear intention to accommodate changing branding practices¹⁶. Moreover, Indian courts have increasingly acknowledged the role of trade dress in establishing a product's identity, especially in passing off cases.

There is growing awareness among businesses and legal professionals about the importance of protecting these unique elements. As Indian markets continue to evolve and consumers become more brand-aware, legal protection of NTTs will likely become a more prominent feature of Indian IP law.

The development of trademark law in India has been anything but static. From colonial-era rules to a modern TRIPS-compliant regime, the journey has reflected not only changes in legal philosophy but also shifts in commerce, technology, and consumer behaviour. While much progress has been made, particularly with the 1999 Act, the evolving nature of trademarks, especially the emergence of non-traditional marks, means that Indian law must continue to adapt.

As businesses innovate in how they present themselves, the legal framework must evolve in tandem to ensure that their unique identity elements, whether it's the shape of a bottle, the jingle of a tune, or the design of a store, are protected just as strongly as names and logos have been in the past. With thoughtful legislative updates and consistent judicial guidance, the Indian trademark system is well on its way to meeting this challenge¹⁷.

STATUTORY BASIS: TRADE MARKS ACT, 1999

In India, the protection of trade dress does not explicitly stand out as a separate legal doctrine under its own heading, as it does in some jurisdictions like the United States. However, the Trade Marks Act, 1999¹⁸ forms the cornerstone of India's statutory framework for the protection of trade dress. While the term "trade dress" is not specifically defined in the Act, the legislative intent and judicial interpretations over the years have allowed for the extension of trademark protection to encompass the overall look and feel of a product or its packaging, effectively aligning with the concept of trade dress.

The Act defines a "trademark" under Section 2(1)(zb)¹⁹ in a broad and inclusive manner. It

¹⁶ The Trade Marks Act, No. 47 of 1999, § 2(1)(zb)

¹⁷ Prashant Reddy T. & Sumathi Chandrashekar, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* 198–201 (2017)

¹⁸ The Trade Marks Act, No. 47 of 1999

¹⁹ The Trade Marks Act, 1999, § 2(1)(zb)

refers to a mark that is capable of being represented graphically and distinguishing the goods or services of one person from those of others. It goes on to list examples such as the shape of goods, packaging, and combinations of colours. This expanded definition is significant because it creates the possibility of bringing non-conventional identifiers, like trade dress, within the protective ambit of trademark law. Even though the term “trade dress” is borrowed more directly from American jurisprudence, Indian law has created space to accommodate such modern branding elements through a wide interpretation of what constitutes a “mark.”

One of the most important implications of this broad definition is that shape marks, colour combinations, and even unique packaging styles, elements traditionally associated with trade dress, can be registered as trademarks, provided they meet the criteria of graphical representation and distinctiveness²⁰. The graphical representation requirement ensures clarity in the scope of the mark, while the distinctiveness requirement demands that the element should not be generic or functional but should serve as a source identifier in the minds of consumers. This interpretation is not only consistent with the text of the Act but also in line with the objectives of modern trademark law, which seeks to protect the identity and goodwill of a brand in an increasingly competitive and visually driven marketplace.

Another relevant provision is Section 9 of the Act, which outlines absolute grounds for refusal of registration²¹. This section becomes particularly important when dealing with trade dress applications, as many features of a product's design or packaging may be considered non-distinctive or purely functional in nature. For instance, if a specific shape is essential to the function of a product, like the shape of a bottle designed for easy grip, it is unlikely to qualify for trademark protection. However, if that shape has acquired secondary meaning or has become strongly associated with a particular brand in the consumer's mind, it stands a better chance of gaining protection under the Act. Thus, secondary meaning plays a crucial role in trade dress registration in India, much like in other jurisdictions.

Section 2(1) (m) of the Act, which defines the term "mark," is also noteworthy in this context²². It includes devices, brands, headings, labels, tickets, names, signatures, words, letters, numerals, shapes of goods, packaging, or any combination thereof. This wide net cast by the legislature indicates a clear willingness to accommodate evolving branding strategies that go

²⁰ The Trade Marks Act, 1999, §§ 2(1)(zb)

²¹ The Trade Marks Act, 1999, § 9(1)

²² The Trade Marks Act, 1999, § 2(1)(m)

beyond traditional word or logo marks. In practical terms, this allows businesses in India to seek protection for their distinctive store layouts, packaging styles, and even product configurations, provided they meet the requirements of the Act.

Beyond registration, the Act also provides remedies for infringement and passing off, both of which are relevant for trade dress protection²³. While registered trademarks can be enforced through the statutory infringement route under Section 29²⁴, unregistered trade dress elements may still receive protection under the common law tort of passing off. Indian courts have been proactive in recognising trade dress within the scope of passing off actions, provided the plaintiff can demonstrate that their trade dress has acquired a distinctive identity and that the defendant's imitation is likely to cause confusion or deception among consumers. This dual-track enforcement system helps bridge the gap between statutory and non-statutory protection, which is particularly helpful in cases where trade dress elements are difficult to register or have not yet been registered.

It is also important to mention that while the Trade Marks Act, 1999, accommodates the protection of trade dress through its expansive definitions and mechanisms, India does not yet have a separate statutory regime for non-traditional marks²⁵. This has led to a somewhat cautious approach among legal practitioners and businesses, who often rely more heavily on passing off doctrines than on formal registration. However, with the rise of consumer-driven markets and increasingly sophisticated brand strategies, Indian trademark law has begun to lean more decisively toward recognising and protecting such elements.

RECOGNITION AND SCOPE OF TRADE DRESS UNDER INDIAN LAW

In the ever-evolving landscape of intellectual property, the concept of trade dress has gained increasing recognition, particularly in markets where visual branding plays a crucial role in influencing consumer choices. While India does not have a standalone legal framework dedicated solely to trade dress, its recognition under the broader umbrella of trademark law is both evident and significant²⁶. With the growing sophistication of branding strategies, trade dress now encompasses not just logos or brand names, but the entire visual experience

²³ The Trade Marks Act, No. 47 of 1999, §§ 29

²⁴ Id

²⁵ V.K. Ahuja, *Law Relating to Intellectual Property Rights* 498–99 (3d ed. 2021)

²⁶ The Trade Marks Act, 1999, § 2(1)(zb)

associated with a product, including its packaging, colour schemes, shapes, and overall presentation.

1. STATUTORY RECOGNITION UNDER THE TRADE MARKS ACT, 1999

Although the Indian Trade Marks Act, 1999 does not specifically define the term “trade dress,” it has a built-in flexibility that allows courts and the Trademark Registry to acknowledge and protect non-traditional brand identifiers. Section 2(1)(m) and Section 2(1)(zb) of the Act are particularly crucial here. Section 2(1)(m) includes shapes of goods, packaging, and combinations of colours under the definition of a “mark,” and Section 2(1)(zb) defines a “trademark” in a broad way to include any mark capable of distinguishing the goods or services of one entity from another²⁷.

This inclusive definition has paved the way for the legal system to treat unique packaging, store layouts, and even the aesthetic design of a product as protectable under Indian trademark law. It’s a quiet recognition, but one that has gradually gained judicial and administrative traction over the past two decades.

2. JUDICIAL ACCEPTANCE: TRADE DRESS IN ACTION

Even in the absence of an explicit statutory term, Indian courts have not shied away from protecting trade dress through the doctrine of passing off. Courts have emphasised that if the overall appearance of a product or its packaging creates an association in the minds of the consumer with a particular brand, then that look and feel deserves protection against imitation. One of the early recognitions of trade dress can be found in the landmark case of *Cadbury India Limited v. Neeraj Food Products*²⁸, where the Delhi High Court acknowledged the importance of product packaging and appearance. The court ruled in favour of Cadbury, stating that the imitation of the colour and style of packaging was enough to mislead consumers, even if the brand name was different. Through such decisions, courts have effectively expanded the scope of trade dress protection, reinforcing that visual elements have intrinsic value in brand identity.

3. SCOPE OF PROTECTION: BEYOND TRADITIONAL TRADEMARKS

Trade dress protection in India has evolved to extend far beyond traditional word or logo marks. It now includes elements like the shape of a perfume bottle, the look of a store interior, or even a combination of colours and designs used on product packaging. As long as these features

²⁷ The Trade Marks Act, No. 47 of 1999, §§ 2(1)(m), 2(1)(zb)

²⁸ 2007 (35) PTC 95 (Del)

serve the function of distinguishing the goods or services of one business from another, they may be eligible for protection.

The scope is also evident in the increasing number of shape marks and colour marks being registered. For example, the Coca-Cola bottle shape and the red colour used by Vodafone in its advertising campaigns are examples of non-traditional trademarks that are, in essence, forms of trade dress. The Trademark Registry, while still cautious, has been gradually receptive to these applications, especially when they are accompanied by strong evidence of acquired distinctiveness.

4. PASSING OFF AND TRADE DRESS: A TRUSTED LEGAL REMEDY

For many businesses in India, especially those unable to secure registration for their trade dress, the common law remedy of passing off continues to be a lifeline. Under this doctrine, a business can prevent another from using a deceptively similar appearance or get-up that could cause confusion among consumers.

To succeed in a passing off action, the plaintiff must demonstrate three key elements: the existence of goodwill in the trade dress, misrepresentation by the defendant, and actual or potential damage caused by that misrepresentation. Indian courts have repeatedly upheld the right of businesses to protect their trade dress under these grounds, even in cases where the elements were not registered trademarks.

India's legal system has undoubtedly acknowledged the growing importance of trade dress as a component of brand identity. Through broad statutory definitions, judicial interpretation, and reliance on the doctrine of passing off, trade dress enjoys a functional, if not formally labelled, place in Indian trademark law. While the protection may not yet be as streamlined or predictable as in some other jurisdictions, the scope is wide enough to accommodate the evolving nature of branding in India's dynamic marketplace.

Going forward, with clearer policies, more awareness among businesses, and possibly statutory refinements, the recognition and protection of trade dress in India could mature into a more robust legal doctrine, one that supports creativity, innovation, and fair competition.

DISTINCTIVENESS AND FUNCTIONALITY TESTS IN INDIAN CONTEXT

When we talk about protecting non-traditional trademarks like trade dress in India, two

fundamental principles come to the forefront, distinctiveness and functionality²⁹. These tests help determine whether a particular mark or visual feature deserves legal protection. Without distinctiveness, a trade dress might not stand out in the consumer's mind, and without passing the functionality test, protection could potentially stifle fair competition. In the Indian legal context, these tests are applied with a level of flexibility, yet the courts and trademark office have been consistent in maintaining certain standards to ensure that trade dress rights are not misused or over-extended.

1. UNDERSTANDING DISTINCTIVENESS: A QUESTION OF CONSUMER PERCEPTION

In India, distinctiveness refers to the ability of a mark, including trade dress, to identify the source of goods or services and distinguish it from others in the market³⁰. This principle lies at the heart of what makes a trademark legally protectable. For trade dress, this may include aspects like product packaging, colour combinations, shapes, or store layouts, anything that helps a customer associate a product with a specific brand³¹.

There are two types of distinctiveness: inherent and acquired. Inherent distinctiveness means that the design or visual element is unique enough to immediately stand out. On the other hand, acquired distinctiveness, also known as secondary meaning, comes from extensive and consistent use in the marketplace. If the public has come to associate a particular trade dress with a brand over time, even a relatively generic design can gain protection.

Indian courts often require strong evidence of acquired distinctiveness, especially for elements that are not inherently unique. This might include sales figures, advertising expenditures, consumer surveys, and media coverage. For example, a bottle shape that seems ordinary at first glance may be protected if consumers have come to recognise it as exclusive to a specific brand due to years of exposure.

2. APPLICATION OF DISTINCTIVENESS IN INDIAN CASE LAW

Judicial interpretation in India has gradually built a framework for assessing distinctiveness in trade dress claims. The courts have taken a nuanced approach, recognising that consumer perception is not static and can evolve with market exposure.

A well-cited example is the *Colgate Palmolive Company v. Anchor Health and Beauty Care*

²⁹ The Trade Marks Act, No. 47 of 1999, § 9

³⁰ *The Trade Marks Act*, No. 47 of 1999, § 2(1)(zb)

³¹ *ITC Ltd. v. Britannia Industries Ltd.*, 2016 SCC OnLine Del 5004

*Pvt. Ltd*³². case. In this matter, the Delhi High Court recognised the colour combination of red and white used by Colgate as a distinctive feature of its packaging. Despite being colours that anyone could theoretically use, the court held that Colgate had acquired distinctiveness through consistent branding and consumer association.

Similarly, in *Gorbatschow Wodka KG v. John Distilleries Limited*³³, the Bombay High Court recognised the unique bottle shape of the vodka brand as a distinctive element, worthy of protection. These examples show that Indian courts are open to recognising trade dress, but only when sufficient distinctiveness is proven.

3. FUNCTIONALITY TEST: DRAWING THE LINE BETWEEN BRANDING AND UTILITY

While distinctiveness tells us what can be protected, the functionality test tells us what cannot. In the Indian context, this test ensures that features of a product that are purely functional or essential to its use or purpose cannot be monopolised under trademark or trade dress law. Protecting such elements would unfairly hinder competition.

The Trade Marks Act, 1999 does not allow the registration of a mark if it consists exclusively of the shape of goods which results from the nature of the goods themselves, or which is necessary to obtain a technical result, or which gives substantial value to the goods (Section 9(3))³⁴. This provision aligns with the functionality doctrine and prevents businesses from using trademark law as a backdoor to extend patent-like protection indefinitely.

For example, if a particular bottle design is shaped a certain way purely because it makes it easier to pour the contents or reduces manufacturing cost, that shape might fail the functionality test³⁵. The court would likely hold that allowing exclusive rights to such a design would be against public interest.

4. JUDICIAL APPROACH TO FUNCTIONALITY IN INDIA

Although Indian jurisprudence on functionality is still developing, courts have acknowledged its significance. In cases where the plaintiff's trade dress includes design elements essential to the product's function, the courts have scrutinised such claims closely.

One practical example comes from disputes involving packaging that doubles as a storage solution or products where the design contributes directly to efficiency or ergonomics. In such

³² 2003 (27) PTC 478 (Del)

³³ 2011 (47) PTC 100 (Bom)

³⁴ *The Trade Marks Act*, No. 47 of 1999, § 9(3)

³⁵ *The Trade Marks Act*, No. 47 of 1999, § 9(3)

instances, Indian courts have been cautious not to grant monopolistic rights over elements that competitors might reasonably need to use.

Importantly, the burden often lies on the registrant or claimant to prove that the trade dress is not functional. This is especially true for shape marks or design elements that appear to contribute to the usability of the product.

5. BALANCING BOTH TESTS: A DELICATE BUT CRUCIAL EXERCISE

The challenge and beauty of Indian trade dress law lies in balancing these two tests. On one hand, the law recognises and rewards branding creativity and consumer recognition. On the other, it ensures that protection does not go so far as to hinder innovation or competition.

In practice, many businesses find themselves walking this fine line. To increase their chances of protection, they focus on building strong brand association over time and avoiding design features that are purely functional. Simultaneously, Indian courts and the Trademark Registry continue to evolve, incorporating global standards while staying rooted in Indian commercial realities.

CASE LAWS AND JUDICIAL RECOGNITION OF TRADE DRESS

The journey of trade dress protection in India has been largely guided by judicial interpretation rather than explicit statutory provisions. While the Trade Marks Act, 1999 does not define "trade dress" as a separate category, the courts have read the concept into the broader idea of "mark" and "packaging" under Sections 2 and 9. Over time, Indian courts have played a critical role in recognising the value of visual presentation in building brand identity and protecting it from unfair imitation. Through a series of key rulings, they have gradually expanded the contours of trade dress law in the Indian context, often adapting from international standards while also aligning with Indian commercial and cultural sensibilities.

One of the earliest and most influential cases in this area is the *Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt. Ltd*³⁶. In this matter, Colgate accused Anchor of adopting a packaging style deceptively similar to its own red-and-white colour scheme. The Delhi High Court acknowledged that the colour combination used by Colgate, though seemingly generic, had acquired distinctiveness due to long-standing use and consumer recognition. The court, therefore, recognised the red-and-white trade dress as a protectable asset, affirming that a

³⁶ (2003) 27 PTC 478 (Del)

combination of colours, shape, and packaging can amount to trade dress if it evokes source identification in the minds of the public. This case significantly influenced later decisions, as it laid down a foundation for examining the distinctiveness of visual elements that might otherwise not be inherently unique.

Another landmark ruling was in the case of *Gorbatschow Wodka KG v. John Distilleries Ltd.*³⁷, where the Bombay High Court addressed the issue of a uniquely shaped vodka bottle. The plaintiff had been using a bulbous, curved design that was clearly different from standard bottles. John Distilleries introduced a product with a bottle shape remarkably similar to that of Gorbatschow's. The court granted an interim injunction, holding that the bottle's distinctive shape was not merely functional but had become associated with the plaintiff's brand. This decision was significant in recognising that the shape of a product, when non-functional and capable of distinguishing the goods of one manufacturer from another, can be granted trade dress protection. It showed the Indian judiciary's readiness to protect even the shape of goods, provided it had achieved a degree of distinctiveness.

The case of *Marico Limited v. Agro Tech Foods Ltd.*³⁸ also added depth to trade dress jurisprudence in India. Marico, the manufacturer of 'Saffola' oil, objected to Agro Tech's packaging, which it alleged was deceptively similar. The court held that even minor similarities in layout, font, colour scheme, and overall look and feel could mislead consumers. This reinforced the idea that trade dress is not just about one dominant feature like a logo or colour but about the overall impression created in the mind of the average consumer. The ruling placed emphasis on the likelihood of confusion, a principle borrowed from traditional trademark jurisprudence, and applied it to trade dress with equal rigour.

Similarly, in *Cadbury India Limited v. Neeraj Food Products*³⁹, the Delhi High Court recognised the trade dress of Cadbury's chocolate packaging. The court held that Cadbury's purple colour scheme and gold writing had become distinctive of the brand and that Neeraj Foods' imitation could deceive consumers. Here, the judgment went a step further to acknowledge the importance of colour and typography, elements often seen as non-traditional, furthering the scope of protectable trade dress in India. This ruling also marked a move towards greater judicial awareness about the subtleties of branding in a visually saturated market.

³⁷ 2011 SCC OnLine Bom 198

³⁸ 2010 SCC OnLine Bom 1202

³⁹ 2007 SCC OnLine Del 1604

In another notable case, *Hindustan Unilever Limited v. Reckitt Benckiser*⁴⁰, the Bombay High Court dealt with competing floor cleaners, HUL's 'Domex' and RB's 'Lizol'. The court carefully analysed the similarities in bottle shape, colour, cap design, and labelling. It observed that even in a market where products may have similar functionalities, visual similarities could not be brushed aside, especially when there was a risk of confusion among rural and less-informed consumers. This case stands out because it acknowledged the diverse consumer base in India and how trade dress protection must consider not just urban, literate consumers, but also those in rural areas with limited exposure to brand differentiation.

The judicial narrative has also recognised the growing complexity of packaging and presentation in the FMCG (Fast-Moving Consumer Goods) sector. In the case of *Tobacco Company v. ITC Limited*⁴¹, concerning cigarette packaging, the court acknowledged that in such a competitive and brand-driven market, even slight imitations in colour gradients, font positioning, or graphic elements could have a profound impact on consumer perception. Here, the decision emphasised the cumulative visual impact of various features, rather than isolating individual aspects, a holistic view that aligns closely with the original intent behind trade dress protection.

What's important to appreciate across these decisions is the judicial shift towards consumer perception. The courts are increasingly evaluating how the ordinary purchaser, often in a hurry, without having time to examine every detail, might react to similar packaging or design. This consumer-focused approach signals a progressive understanding of trade dress, especially as Indian markets become more competitive and visually sophisticated.

While India has not formally adopted the term "trade dress" in its statute, the cumulative effect of these judicial decisions has created a de facto recognition of trade dress as a legitimate form of intellectual property. The courts have shown a balanced approach, offering protection to businesses that invest in their brand identity while also making sure that no one can monopolise functional or generic design elements.

PROCEDURAL ASPECTS OF REGISTRATION AND ENFORCEMENT

Trade dress protection in India has gained significant relevance in recent years, not only in the

⁴⁰ 2014 SCC OnLine Bom 1023

⁴¹ (2009) 41 PTC 251 (Del)

legal domain but also across industries where brand identity and visual cues play a decisive role in consumer preferences. While trade dress is not explicitly defined under the Trade Marks Act, 1999, the Act's provisions are broad enough to include it within the scope of a trademark⁴². Understanding the procedural pathway for registration and enforcement is essential for rights holders to secure and protect these valuable assets.

1. FILING FOR REGISTRATION

The process of registering trade dress in India is largely similar to that of registering conventional trademarks. Applicants must file an application with the Office of the Controller General of Patents, Designs and Trade Marks, under the Ministry of Commerce and Industry⁴³. Typically, trade dress elements such as packaging, colour combinations, shapes, or even store layouts, are applied for under the broader category of trademarks⁴⁴.

In the application, it's important to clearly describe the features that constitute the trade dress being claimed. This includes submitting visual representations, photos, drawings, and descriptions, that highlight the distinctive aspects of the product or packaging. Applicants are also advised to include a statement of use and, where possible, evidence of acquired distinctiveness or secondary meaning that proves the trade dress is associated with their brand in the minds of consumers.

Though trade dress does not have a separate classification under the NICE classification system, applicants must select the appropriate class based on the nature of their goods or services⁴⁵. Accuracy at this stage helps avoid delays or rejections.

2. EXAMINATION AND OBJECTIONS

Once filed, the application is examined by the Trade Marks Registry to determine whether the claimed trade dress qualifies for registration. The Registry primarily evaluates inherent distinctiveness and non-functionality, two critical aspects for trade dress protection⁴⁶. If the trade dress is considered generic, functional, or lacking distinctiveness, the examiner may raise objections under Sections 9 or 11 of the Trade Marks Act.⁴⁷

At this stage, the applicant has the opportunity to respond to objections, provide clarifications,

⁴² The Trade Marks Act, No. 47 of 1999, §§ 2(1)(m), 2(1)(zb)

⁴³ Ministry of Commerce and Industry, Office of the Controller General of Patents, Designs and Trade Marks, available at <https://ipindia.gov.in/>

⁴⁴ Trade Marks Rules, 2017, Rule 10

⁴⁵ World Intellectual Property Organization (WIPO), Nice Classification – Tenth Edition, available at <https://www.wipo.int/classifications/nice/en/>

⁴⁶ Trade Marks Act, § 9(1)–(3)

⁴⁷ Id § 11

and submit evidence such as advertisements, sales data, and consumer surveys to establish distinctiveness. If the Registrar is satisfied, the application proceeds to publication in the Trade Marks Journal, opening the door for third-party opposition⁴⁸.

3. OPPOSITION AND REGISTRATION

Trade dress applications can be opposed by third parties within four months of publication. Such opposition usually alleges similarity with existing trademarks or argues that the claimed trade dress lacks distinctiveness or is functional. The opposition process can be extensive, involving the exchange of notices, counter-statements, affidavits, and hearings before the Registrar⁴⁹.

If no opposition is filed, or if it is resolved in favour of the applicant, the trade dress is formally registered and a registration certificate is issued. From this point, the rights holder enjoys exclusive use of the trade dress in relation to the goods or services listed in the registration.

4. ENFORCEMENT OF TRADE DRESS RIGHTS

Enforcement in India is mainly carried out through the civil courts, with remedies such as injunctions, damages, and account of profits available to aggrieved parties. Trade dress infringement cases are typically brought under Section 29 of the Trade Marks Act (infringement of registered marks) or Section 27 (passing off in case of unregistered marks)⁵⁰. Courts assess whether the allegedly infringing product creates a likelihood of confusion or deception among consumers due to similar visual features. Judges also examine the overall impression, rather than conducting a side-by-side comparison. This consumer-oriented approach has helped Indian courts build a flexible yet protective jurisprudence around trade dress.

5. RELIEF AND REMEDIES

The most common form of relief sought in trade dress litigation is an interim or permanent injunction, restraining the infringer from continuing the use of the contested design or packaging. In addition to injunctive relief, courts may grant damages or an account of profits, where the infringer is made to pay for the losses suffered by the rightful owner or the unjust gains accrued through misuse.

⁴⁸ *Trade Marks Act*, § 20

⁴⁹ *Trade Marks Rules*, 2017, Rules 42–51

⁵⁰ The Trade Marks Act, 1999, §§ 27, 29

Courts have also passed orders for destruction of infringing goods, seizure of packaging materials, and occasionally, publication of corrective advertisements to reduce consumer confusion. In urgent cases, ex parte injunctions are granted to prevent irreparable harm before the full matter is heard.

LIMITATIONS AND CHALLENGES IN THE INDIAN LEGAL FRAMEWORK

Trade dress, as a form of intellectual property, is increasingly playing a vital role in brand identity and market competitiveness. However, despite the recognition of trade dress under Indian law, specifically within the ambit of the Trade Marks Act, 1999⁵¹, its protection and enforcement continue to face considerable hurdles. These challenges stem from both legislative ambiguities and practical enforcement roadblocks. As India continues to adapt to a fast-evolving global IP landscape, a closer look at these limitations is crucial for identifying opportunities for reform.

1. ABSENCE OF EXPLICIT DEFINITION

One of the most notable limitations in India's legal framework is the absence of a precise and standalone definition of "trade dress." While Section 2(zb) of the Trade Marks Act, 1999⁵² does include aspects such as "shape of goods, packaging and combination of colours" in its broad definition of a trademark, the Act does not clearly articulate what constitutes trade dress in itself. This lack of definitional clarity leads to uncertainty, both for rights holders and legal practitioners, when determining what is protectable and what isn't. The absence of statutory guidance also creates inconsistencies in interpretation across different cases.

2. INCONSISTENT JUDICIAL INTERPRETATION

Although Indian courts have begun recognising and protecting trade dress more robustly in recent years, the approach still varies significantly from case to case. In some decisions, courts have given considerable weight to visual similarities and consumer perception, while in others, protection has been denied due to a perceived lack of distinctiveness or evidence of consumer confusion. This inconsistency poses a risk to brand owners, who are left unsure of how courts will assess their trade dress rights, especially in cases involving non-traditional or unconventional elements such as store layouts or colour schemes.

⁵¹ The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999

⁵² Id § 2(zb)

3. PROVING DISTINCTIVENESS AND SECONDARY MEANING

A common legal requirement in trade dress protection, particularly for unregistered marks, is proving that the trade dress has acquired distinctiveness or secondary meaning. This becomes a significant hurdle in India where such evidence often requires detailed consumer surveys, marketing expenditure records, and extensive use over time. For small businesses and emerging brands, this kind of documentation may not always be readily available, making it difficult to assert or enforce trade dress rights, even if imitation by a competitor is evident.

4. LACK OF AWARENESS AMONG STAKEHOLDERS

Another challenge lies in the general lack of awareness about trade dress among businesses, legal professionals, and enforcement agencies. Many brand owners, especially in MSMEs and startups, are unaware that their packaging, product shape, or visual branding can be protected under trademark law. As a result, they fail to proactively register or assert their rights. On the enforcement side, police officers, customs officials, and even lower court judges may not always be well-versed in identifying or handling trade dress disputes, weakening the effectiveness of the protection mechanisms that do exist.

5. FUNCTIONAL FEATURES DILEMMA

Like many jurisdictions, India does not allow trade dress protection for functional elements, that is, features that serve a utilitarian purpose rather than aesthetic or source-identifying functions⁵³. While this makes sense conceptually, in practice, the line between what is functional and what is ornamental can be very blurry. For example, a uniquely shaped bottle may serve both a functional purpose and act as a brand identifier. In such cases, the functional exclusion rule may unfairly prevent protection, particularly when courts or examiners lean heavily toward rejecting claims that touch on utility in any way.

6. PROCEDURAL DELAYS AND ENFORCEMENT BOTTLENECKS

The Indian legal system, though evolving, still suffers from procedural delays, especially in IP litigation. Trade dress cases, which often involve urgent matters of market confusion or unfair competition, can lose impact when interim relief is delayed or enforcement is sluggish. The time lag in getting injunctions or final judgments often allows infringers to benefit commercially in the short term, even if the eventual verdict favours the original brand owner.

⁵³ The Trade Marks Act, 1999, § 9(3)

Additionally, limited expertise in trade dress matters among administrative staff at the Trade Marks Registry may lead to delays in registration or flawed examination reports.

CONCLUSION

The legal framework governing the protection of trade dress in India has certainly made notable strides over the years, yet it still finds itself in a state of evolution, grappling with challenges and seeking clarity amidst complexity. Trade dress, which encompasses the visual appearance of a product or its packaging that signals its source to consumers, has become an essential part of brand identity in today's fiercely competitive market. The Indian legal system, through the Trade Marks Act, 1999, has acknowledged this need by incorporating trade dress under the broader umbrella of trademarks⁵⁴. However, the journey from legal recognition to effective protection is far from linear or complete.

At its core, the protection of trade dress in India has relied heavily on judicial interpretation. While this judicial activism has undoubtedly pushed the boundaries of what is considered protectable, it has also left room for inconsistencies. Different courts have adopted different benchmarks when it comes to assessing distinctiveness, consumer confusion, or even what constitutes functionality in design. As a result, there is no universally settled approach within the Indian context, which makes it difficult for rights holders to confidently rely on predictable outcomes. This lack of a consistent legal yardstick can be particularly daunting for small businesses or individual creators who lack the legal resources or deep understanding of the system.

Despite this, India's judiciary deserves credit for being responsive and adaptive. Over time, it has shown a willingness to interpret the law in a manner that supports innovation and branding. Landmark judgments, such as those in the *Colgate Palmolive v. Anchor Health and Beauty Care* or *Gorbatschow Wodka KG v. John Distilleries*⁵⁵, have clarified that trade dress can be protected even without formal registration, provided it has acquired distinctiveness. These cases demonstrate that Indian courts are attuned to the changing dynamics of branding and consumer perception, and are willing to protect not just the name of a product, but its overall look and feel.

⁵⁴ Trade Marks Act, 1999, § 2(zb)

⁵⁵ 2009 (39) PTC 156 (Del.); 2008 (37) PTC 594 (Bom.)

However, the lack of a separate and explicit statutory provision specifically dedicated to trade dress continues to be a major gap in the Indian legal landscape. Unlike the U.S., where the Lanham Act provides detailed guidance on trade dress protection⁵⁶, Indian law still treats it as an implied subcategory of trademarks. This approach, while flexible in some cases, results in ambiguity and misinterpretation. Trade dress protection could be made more robust and accessible by formally codifying it within the statute, outlining its definition, scope, criteria for protection, and procedural requirements in clear terms. This would not only provide greater legal clarity but also encourage more proactive registration and enforcement efforts by brand owners.

Another key takeaway from studying the Indian framework is the difficulty involved in proving distinctiveness and secondary meaning, especially for unregistered trade dress. The legal requirement that a product's design must have acquired a distinct association in the minds of the public is a high threshold to meet. It often demands extensive market presence, advertising expenditure, and evidence of consumer recognition. For many businesses, especially emerging ones, gathering and presenting this kind of evidence is not just time-consuming but also prohibitively expensive. This creates an uneven playing field, where large corporations can assert their rights more effectively than smaller enterprises, stifling fair competition in the marketplace.

The procedural mechanisms for registering and enforcing trade dress protection also reveal certain inefficiencies. While the Trade Marks Registry has opened the door for registering shapes, packaging, and colour combinations, the actual examination process remains inconsistent. Applications are often rejected due to overly technical objections or a lack of understanding about the unique role of trade dress. Furthermore, enforcement through litigation continues to be marred by procedural delays, shortage of specialised IP benches in lower courts, and limited awareness among enforcement authorities. For a country that is aspiring to be an innovation-driven economy, these procedural delays are a significant setback.

Another concern is the general lack of awareness among businesses, particularly small and medium enterprises, about what trade dress actually entails and how it can be protected. Many brand owners do not realise that the packaging they carefully design, or the aesthetic elements they uniquely combine, can qualify for protection under IP law. As a result, these valuable

⁵⁶ Lanham Act 15 U.S.C. § 1125(a)

assets remain vulnerable to imitation and misuse. This calls for greater educational initiatives and government-led awareness campaigns to ensure that creators across industries, and not just in big corporate circles, are equipped with the knowledge to safeguard their visual identity.

Despite all these challenges, the Indian legal framework is not static. It is slowly but surely moving in a direction that appreciates the commercial value and legal importance of trade dress. The future, therefore, lies in building on the existing legal foundation, clarifying ambiguities through legislation, enhancing administrative capacity, and fostering a legal culture that is receptive to the nuances of modern branding. In an era where market differentiation often hinges on design, colour, and packaging as much as on product quality, trade dress protection is no longer optional, it is essential.

While India has made commendable efforts to recognise and protect trade dress under its trademark law, the journey towards comprehensive and reliable protection is still unfolding. The need of the hour is a more defined legislative framework.

