

Trade Dress: Do You Have One? The Concept and its Application in Fashion Industry

Vinish Mehra, National Institute of Fashion Technology, India

imprinted on it “The Design of this box is a registered TRADEMARK of McDonalds Corporation and Affiliates”. Yes, you can’t copy even the design of the box! Do you also possess something similar? If yes, that’s your TRADE DRESS. Today, more than ever before, the value and commercial viability of any business is indubitably tied to its intellectual property (IP). Moreover, intellectual property is increasingly becoming the subject of extensive litigation. For these reasons, it is inevitable for businesses to take steps to insure that the commercially important intangible assets that they possess are adequately and appropriately protected. Trademark law is one such enactment, which serves to protect and distinguish the goods and services of one trader from those of another. In essence, a trademark is a “badge of origin”, used so that customers can recognise the product of a particular trader. It provides protection from others using the name of one’s company or its products. A Trademark is a type of Intellectual Property, and in particular, a type of Industrial Property. Conventionally, a trademark comprises of a name, word, phrase, logo, symbol, design, image, or a combination of one or more of these elements. There are also a range of non-conventional trademarks which don’t fall in these standard categories. An example of a trademark is the ubiquitous Nike[®] swoosh. The general public recognises this graphic element as belonging to a genuine Nike product, and thus expects a certain caliber of product to be attached to the mark. SWOOSH, the popular logo of Nike, Inc., is a graphic design created by Carolyn Davidson in 1971 for \$35. The logo is meaningless, a graphical figure reminiscent of a calligraphical flick of the pen, and was created before the name was chosen. Swoosh remains one of the most well-known trademarks. Apart from the conventional protection under trade names and trademarks, there exists another form of safeguard known as trade dress. Simply put, trade dress is the arrangement of identifying characteristics or decorations connected with a product, whether by packaging or otherwise, intended to make the source of the product distinguishable from another and to promote its sale. One of the best examples to illustrate the concept of trade dress is that of Kellogg’s[®]. In a supermarket, a box of Kellogg’s[®] cereals can easily be found/identified on the shelf from a certain distance, due to the unique design, the color, the shape, the red logo, and other additional elements of Kellogg’s[®], which can readily be differentiated from other logotypes available in market, thus constituting a unique product-image. The shape of a bottle containing shampoo or hair-oil can be a trade dress. Similarly, the shape

or ornamental features of a chair, its configuration, can constitute a trade dress. Even the theme of a restaurant, the layout of a website, or the distinctive performing style of a rock band may be considered as a trade dress. Therefore, in some instances the trade dress is reflected in the combination of packaging and labels, and in another, it is the product configuration that constitutes the trade dress. Other examples of trade dress include the shape of the Coca-Cola[®] bottle, the front grill on the Rolls-Royce automobile, the shape of a classic Ferrari sports car, the round wall-thermostat by Honeywell, cover jacket of Merriam-Webster's New Collegiate Dictionary, the appearance of a Teddy Bear toy, the G shape of the frame of a GUCCI watch, or a particular fragrance on a sewing thread. Thus, trade dress protects a product's image encompassing the total image or overall impression created by the product and its packaging. In essence, to a layman, trade dress is a company's image within the marketplace. This is the simplest legal definition of trade dress. However, law relating to the concept is never simple. Trade dress protection and infringement can be one of the thorniest issues to tackle. Questions of protection or infringement very often raise intricate issues. Now, if trade dress can protect items as varied as the aforementioned, surely there must be a place in trade dress law for fashion works? This paper is an attempt to expound the concept of trade dress and its far-reaching implications in determining the commercial success of a fashion enterprise.