

ILE INTELLECTUAL PROPERTY AND CORPORATE LAW REVIEW



VOLUME 2 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



ILE INTELLECTUAL PROPERTY AND CORPORATE LAW REVIEW

(Free Publication and Open Access Journal)

Journal's Home Page – <https://ipclr.iledu.in/>

Journal's Editorial Page – <https://ipclr.iledu.in/editorial-board/>

Volume 2 and Issue 1 (Access Full Issue on – <https://ipclr.iledu.in/category/volume-2-and-issue-1-of-2023/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



© Institute of Legal Education

Copyright Disclaimer: All rights are reserve with Institute of Legal Education. No part of the material published on this website (Articles or Research Papers including those published in this journal) may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher. For more details refer <https://ipclr.iledu.in/terms-and-condition/>

The Role of Consumer Perception in Establishing Trade Dress Protection for Fashion Products

Author – Shubham Mahadeo Walunj, Student at Savitribai Phule Pune University, Pune

Best Citation – Shubham Mahadeo Walunj, The Role of Consumer Perception in Establishing Trade Dress Protection for Fashion Products, *ILE INTELLECTUAL PROPERTY AND CORPORATE LAW REVIEW*, 2 (1) of 2023, Pg. 25–31, ISSN – 2583–6153.

Abstract

Trade dress protection is crucial for businesses operating in the fashion industry, as it allows them to protect the unique appearance of their products from imitation by competitors. However, establishing trade dress protection can be challenging, as it requires demonstrating the distinctiveness and non-functionality of the product's appearance. One important factor in establishing trade dress protection is consumer perception.

This article examines the role of consumer perception in trade dress protection for fashion products, including the importance of distinctiveness and non-functionality, the use of consumer surveys to establish perception, and the impact of the Lanham Act on establishing consumer perception. The article also explores the challenges of establishing consumer perception, including the relationship between trade dress and trademark protection, the impact of brand recognition, and the difficulty of maintaining consistent use of trade dress.

The article analyses relevant case law related to consumer perception in trade dress protection for fashion products, including key takeaways from the cases. Finally, the article discusses the impact of fast fashion on consumer perception and trade dress protection and strategies for protecting trade

dress in the fast fashion environment. Overall, this article emphasizes the importance of consumer perception in establishing trade dress protection for fashion products and provides guidance for fashion brands and designers seeking to protect their unique product designs.

I. Keyword

Trade dress, fashion products, consumer perception, fast fashion, trademark protection, brand recognition, consumer surveys.

II. Introduction

The fashion industry is one of the most competitive industries in the world, with brands constantly fighting for market share and consumer attention. To succeed in such an environment, brands must distinguish themselves through their unique designs and styles. However, as any successful fashion brand will tell you, design alone is not enough to achieve long-term success. To truly stand out in the crowded fashion marketplace, brands must protect their intellectual property, particularly their trade dress.

Trade dress refers to the visual way the product looks, including its packaging, design, shape, and colours. In the fashion industry, trade dress protection is essential for protecting the unique appearance of a brand's products, from the colour and pattern of a fabric to the design of a handbag. However, establishing trade dress protection is not always straightforward, particularly when it comes to consumer perception.

Consumer perception plays a critical role in establishing trade dress protection for fashion products. The distinctiveness and non-functionality of a product's design are crucial factors in determining whether it is eligible for trade dress protection. However, to establish these factors, the courts often consider consumer perception of the design in question. In other words, if consumers perceive a

product's design as distinctive and non-functional, it is more likely to be granted trade dress protection.

This article will explore the role of consumer perception in establishing trade dress protection for fashion products. We will examine the legal background of trade dress protection and the challenges of establishing consumer perception. We will also look at strategies for maintaining consistent use of trade dress and the impact of fast fashion on consumer perception and trade dress protection. Finally, we will discuss the implications of consumer perception in establishing trade dress protection for fashion products and the importance of protecting trade dress in promoting innovation and competition in the fashion industry.

III. Definition of Trade Dress and its protection in the fashion industry

A. Definition of Trade Dress

Trade dress refers to the unique visual appearance and design of a product or its packaging that serves to identify and distinguish it from other products in the marketplace. In the fashion industry, trade dress can refer to the unique combination of colours, shapes, textures, and other design elements that identify a fashion product or brand. Trade dress protection can extend to a wide range of fashion products, including clothing, accessories, footwear, and even retail store designs.

The scope of trade dress protection for fashion products is determined by its distinctiveness and non-functionality. A trade dress must be sufficiently unique and original to identify and distinguish the product from others in the marketplace. Additionally, the trade dress must not be functional in nature, meaning that it must not be crucial to the usage or functioning of the product.

B. Laws and regulations governing trade dress protection

In India, trade dress protection is granted under the Trade Marks Act, 1999. Section 2(zb) of the Act defines trade dress as the "features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article, whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye."⁹⁰

In the United States, trade dress protection for fashion products is governed by the 43(a) of the Lanham Act, which prohibits the use of any trade dress that is likely to cause confusion or mistake among consumers as to the source of the product⁹¹. The act also prohibits any use of trade dress that is likely to dilute or tarnish the characteristic of a "famous" mark.

Trade dress protection in the fashion industry is granted based on its distinctiveness and non-functionality. The distinctiveness of trade dress is determined by whether it is capable of distinguishing the products of one vendor or supplier from that of other. Non-functionality refers to the protection of trade dress features that are not essential to the function of the product.

IV. Establishing Consumer Perception in Trade Dress Protection for Fashion Products

A. Importance of consumer perception in establishing trade dress protection

Consumer perception plays a crucial role in establishing trade dress protection for fashion products. In order for trade dress to be protected, it must be distinctive and non-functional⁹². The distinctiveness of trade dress is

⁹⁰ Trade Marks Act, 1999 § 2(zb)

⁹¹ Lanham Act, Trademark Act of 1946 § 43(a)

⁹² NY Trademark Lawyer, <https://www.ny-trademark-lawyer.com/what-is-trade-dress-and-how-can-it-be-protected.html> (Last Visited Feb. 1, 2023)

determined by whether it is capable of distinguishing the goods of one manufacturer or seller from those of another⁹³. Non-functionality refers to the protection of trade dress features that are not essential to the function of the product.

Consumer perception is important in establishing the distinctiveness of trade dress. If consumers perceive the trade dress to be unique and indicative of a specific brand or source of origin, then it is more likely to be protected. Consumer perception can be established through various means, including consumer surveys, market research, and advertising.

Consumer surveys are a common method for establishing consumer perception in trade dress protection cases. Surveys can be used to determine whether consumers recognize the trade dress as being associated with a specific brand or source of origin. The survey results can then be used as evidence in legal proceedings to support a claim of trade dress infringement.

B. The relationship between trade dress and trademark protection in establishing consumer perception

Consumer perception plays a significant role in determining whether a particular trade dress is eligible for protection under the Trade Marks Act, 1999. The relationship between trade dress and trademark protection is critical in establishing consumer perception for fashion products in India. While trade dress protection applies to the visual elements of a product's appearance, trademark protection applies to the name or symbol that represents the product. Both trade dress and trademark protection aim to prevent confusion among consumers and maintain healthy competition in the market.

Trade dress protection focuses on the overall appearance of a product, including its packaging, shape, design, and colours. In contrast, trademark protection focuses on the name or symbol that represents the product. Trade dress protection is granted based on the distinctiveness and non-functionality of the product's visual elements, while trademark protection is granted based on the distinctiveness and non-generic nature of the product's name or symbol.

Establishing consumer perception in trade dress protection requires demonstrating that the distinctive visual elements of a product are recognized by consumers as identifying the origin of the product. Similarly, establishing consumer perception in trademark protection requires demonstrating that the product's name or symbol is recognized by consumers as identifying the source of the product.

In the fashion industry, establishing consumer perception through trade dress and trademark protection is critical for maintaining brand identity and preventing confusion among consumers. For instance, a well-known fashion brand with a unique and distinctive trade dress will likely be more recognizable and trusted by consumers than a lesser-known brand with a generic trade dress.

C. The impact of the Lanham Act on establishing consumer perception in trade dress protection

The Lanham Act, which is the US federal statute governing trademarks and trade dress, has a significant impact on establishing consumer perception in India. The Act is used as a reference to determine the scope and requirements for trade dress protection. The Act recognizes that consumer perception is a critical factor in establishing trade dress protection, and thus, courts often rely on consumer surveys to determine the level of consumer recognition of a particular trade dress.

⁹³ Watts Guerra, <https://wattsguerra.com/what-is-a-trademark-and-how-can-i-protect-one/> (Last Visited Feb. 1, 2023)

Brand recognition also plays a crucial role in establishing consumer perception in the fashion industry in the world. A well-established fashion brand with a reputation for producing high-quality products will have a higher level of consumer recognition and trust. In contrast, a lesser-known brand may struggle to establish consumer perception and recognition for its trade dress.

V. Challenges in Establishing Consumer Perception

A. Challenges in Establishing Consumer Perception in India vs USA

Establishing consumer perception in trade dress protection for fashion products can be challenging in both India and the USA. But there are major distinctions between the two nations that provide unique challenges.

In India, one of the primary challenges in establishing consumer perception is the lack of clear guidelines on how to conduct consumer perception surveys. While the Trade Marks Act, 1999 recognizes the importance of consumer perception in trade dress protection, it does not provide detailed instructions on how to conduct consumer surveys or establish the level of consumer recognition required for trade dress protection. As a result, the level of consumer recognition required for trade dress protection can be challenging to determine.

Lack of consumer perception of the significance of trade dress protection is another challenge in India. Unlike in the USA, where trade dress protection is well established and recognized by consumers, Indian consumers may not fully understand the significance of trade dress protection. This lack of understanding can make it challenging to establish consumer perception for trade dress protection in the Indian market.

The higher amount of competitiveness in the fashion business, in contrast, is one of the major obstacles to shaping customer perception in

the USA. With numerous brands competing for consumer attention, establishing a unique and recognizable trade dress can be challenging. Additionally, the level of consumer recognition required for trade dress protection in the USA is higher than in India. The courts in the USA often require a higher level of consumer recognition, which can make it challenging for new or lesser-known brands to establish trade dress protection.

Another challenge in the USA is the high cost of conducting consumer perception surveys. The cost of conducting surveys to establish consumer perception can be prohibitively high for small businesses, making it challenging for them to compete with larger brands that have the resources to conduct surveys regularly.

B. Challenges in Establishing Consumer Perception in India

While establishing consumer perception is essential in protecting trade dress for fashion products in India, there are several challenges that brand owners and legal practitioners face in this process. Some of the most prominent challenges are discussed below:

1. Subjectivity of Consumer Perception

Consumer perception is subjective and can vary from one individual to another. What one consumer may find distinctive and unique, another may not. This subjectivity can make it difficult to establish a consensus on whether a particular trade dress is distinctive enough to warrant protection.

2. High Standards of Distinctiveness

The Trade Marks Act, 1999, requires that a trade dress must be distinctive and non-functional to be eligible for protection. However, establishing the level of distinctiveness required for trade dress protection can be challenging, particularly in the fashion industry, where design elements may be common or widely used.

3. Lack of Clear Guidelines

The Trade Marks Act, 1999, does not provide clear guidelines for establishing consumer perception in trade dress protection. This lack of clarity can lead to inconsistency in legal decisions and make it difficult for brand owners to determine the level of consumer perception required for their trade dress to be protected.

4. High Costs of Consumer Surveys

Consumer surveys are often used to establish consumer perception in trade dress protection cases. However, conducting these surveys can be expensive, particularly for smaller brands or independent designers who may not have the resources to fund such research.

5. Lengthy Legal Proceedings

Establishing consumer perception in trade dress protection cases can involve lengthy legal proceedings that can take years to resolve. These lengthy legal proceedings can be financially and emotionally draining for brand owners and can delay the launch of new products.

In conclusion, while establishing consumer perception is essential in trade dress protection for fashion products in India, several challenges need to be addressed. These challenges require the development of clear guidelines for establishing consumer perception and the consideration of alternative methods for demonstrating consumer perception, such as expert testimony or market research data.

VI. The Effect of Fast Fashion on Consumer Perception and Trade Dress Protection

A. The impact of fast fashion on consumer perception and trade dress protection in the fashion industry

The rise of fast fashion has had a significant impact on consumer perception and trade dress protection in the fashion industry. Fast

fashion refers to the trend of producing affordable clothing quickly and in large quantities. This trend has led to the production of clothing items that resemble high-end designer pieces, often infringing on trade dress protection. Fast fashion has changed the way consumers perceive fashion products, leading to a greater emphasis on affordability and trends rather than quality and originality. As a result, consumers may be less likely to recognize or value the unique trade dress of high-end designer brands. This shift in consumer perception can make it challenging for fashion businesses to establish and maintain trade dress protection.

Furthermore, the fast fashion industry often copies the designs and trade dress of high-end designer brands, which can lead to infringement and dilution of trade dress protection. Fast fashion brands may use similar colours, patterns, and designs to high-end designer brands, leading to confusion among consumers and a decrease in the distinctiveness of trade dress. In addition, fast fashion companies often operate in countries with weak intellectual property laws, making it challenging for high-end designer brands to protect their trade dress. These companies may be able to copy and produce similar designs without fear of legal repercussions.

The rise of fast fashion has had a significant impact on consumer perception and trade dress protection in the fashion industry. It has led to a shift in consumer preferences and a decrease in the distinctiveness of trade dress. Fashion businesses must adapt to these changes to establish and maintain trade dress protection in the fast-paced global market.

B. Strategies for protecting trade dress in the fast fashion environment

In the fast fashion environment, protecting trade dress can be challenging. However, there are several strategies that fashion businesses

can use to establish and maintain trade dress protection:

1. Registering trade dress

Registering trade dress with the relevant intellectual property office can provide legal protection for the unique appearance of fashion products. This protection can deter fast fashion companies from copying the designs and trade dress of high-end designer brands.

2. Consistency in branding

Establishing a consistent brand image can help consumers recognize and value the unique trade dress of fashion products. This consistency can include using the same colours, patterns, and designs across different products and marketing materials.

3. Collaboration with influencers

Partnering with influencers can help establish and maintain consumer perception of trade dress. Influencers can help promote the brand image and create a recognizable look that consumers can associate with the fashion business.

4. Monitoring for infringement

Regular monitoring for infringement can help fashion businesses identify and address potential violations of their trade dress. This monitoring can include searching for similar designs and colours used by fast fashion companies and taking legal action against infringement.

5. Innovation and differentiation

Fashion businesses can differentiate themselves from fast fashion companies by focusing on innovation and creating unique designs that cannot be easily copied. This differentiation can help establish and maintain trade dress protection. In conclusion, protecting trade dress in the fast fashion environment can

be challenging, but implementing these strategies can help establish and maintain consumer perception and legal protection for the unique appearance of fashion products.

VII. Future of Trade Dress Protection in the Fashion Industry

Trade dress protection has played a critical role in promoting innovation and competition in the fashion industry. By protecting unique and recognizable visual elements, trade dress protection incentivizes fashion businesses to invest in creating distinctive designs that set them apart from competitors. This, in turn, leads to increased competition and innovation in the industry.

As the fashion industry continues to evolve, there are several future trends and challenges that may impact trade dress protection for fashion products. One trend is the growing importance of sustainability and ethical production practices. Consumers are increasingly demanding that fashion businesses adopt sustainable and ethical practices, which may impact the visual elements of their products. This, in turn, may impact the trade dress protection of fashion products.

Another trend is the growth of e-commerce and online marketplaces, which has made it easier for counterfeit products to enter the market. This poses a significant challenge to trade dress protection, as it may be more challenging to establish consumer perception and protect trade dress in an online environment. Additionally, there may be changes to trade dress protection laws in the future, which could impact the level of protection available to fashion businesses. For example, there may be changes to the level of consumer recognition required for trade dress protection, or changes to the types of visual elements that can be protected.

Despite these challenges, the future of trade dress protection in the fashion industry remains essential. By protecting the unique visual elements of fashion products, trade dress protection promotes innovation and competition in the industry, ultimately benefiting both businesses and consumers.

VIII. Conclusion

In conclusion, consumer perception plays a crucial role in establishing trade dress protection for fashion products. It is essential for businesses to create unique and recognizable visual elements that consumers can associate with their brand. This not only helps establish consumer perception but also helps protect the trade dress of fashion products. Trade dress protection is critical for the fashion industry and the economy at large. It promotes innovation and competition in the industry, driving growth and job creation. Additionally, trade dress protection incentivizes businesses to invest in creating unique designs, which helps create brand recognition and value.

While there are challenges to establishing consumer perception and protecting trade dress in the fashion industry, strategies such as building brand recognition and taking proactive legal action can help businesses protect their unique visual elements. Overall, the role of consumer perception in establishing trade dress protection for fashion products cannot be overstated. By protecting the unique visual elements of fashion products, trade dress protection helps promote innovation, competition, and economic growth in the fashion industry and beyond.