

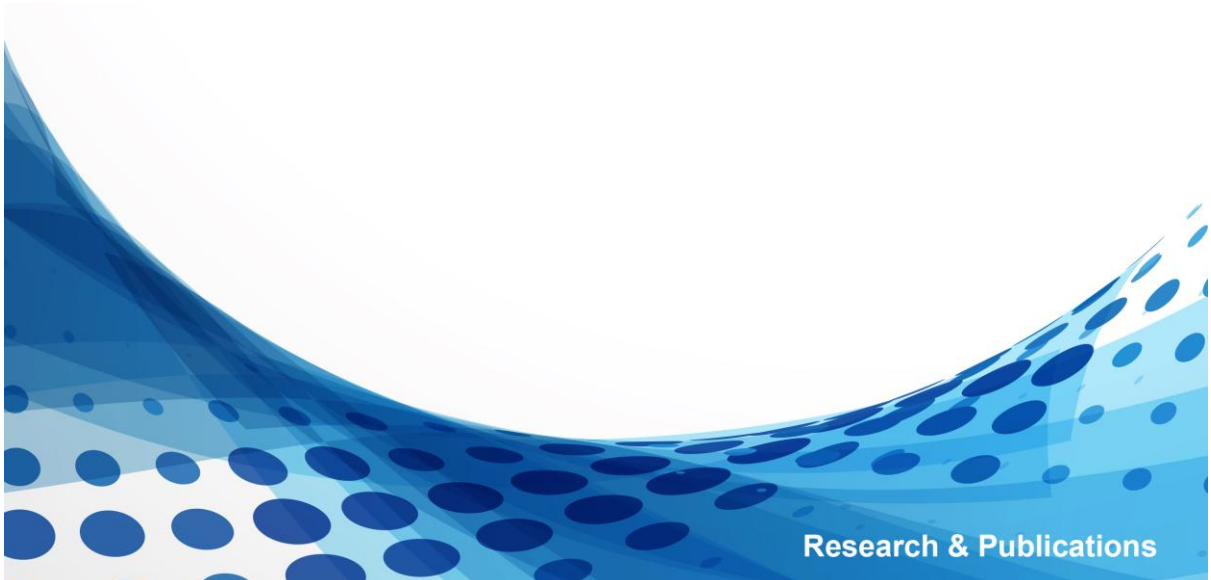


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## TRADE-DRESS LAW IN INDIA

M P Ram Mohan  
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## TRADE-DRESS LAW IN INDIA

M P Ram Mohan\* & Pratishta Agarwal\*\*

### Abstract

The increased emphasis on visual presentation and brand experience has elevated trade-dress from a peripheral concern to a central feature of trademark protection. Indian trade-dress protection is currently spread across multiple intellectual property legal regime with special emphasis through the passing-off law under the trademarks Act 1999. Despite commercial importance of trade-dress law, and without explicit statutory definition of what constitutes trade-dress, its protection is shaped almost entirely through a patchwork of judicial interpretation across the Supreme Court and the High Courts. The present study undertakes a mapping and comparative analysis of trade-dress jurisprudence across the Supreme Court of India and four major High Courts; Delhi, Bombay, Madras and Calcutta. The analysis reveals a fragmented landscape highlighting divergent judicial approaches to distinctiveness, consumer perception, functionality and evidentiary thresholds, The present study further identifies persistent doctrinal tensions from the conflation of trade-dress with copyright and design law in the Indian context. The authors argue for a more disciplined and coherent framework for trade-dress protection in India.

Keywords: Trade-dress, Trademarks, Indian Trademarks Act

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## 1. INTRODUCTION

Trade-dress refers to the overall image used to present a product or service to the purchasers, mostly commonly manifesting in the packaging and labels of a particular product.<sup>1</sup> Beyond packaging, it may also encompass characteristics of the good itself such as its configuration, color, or scent and can even extend to the layout associated with the services or even, the unique sales techniques of a proprietor. trade-dress may encompass virtually any combination of features that together constitute the overall commercial image of a product in essence. There is a growing recognition that visual distinctiveness embedded in trade-dress constitutes a core strategic asset in modern brand strategy and management.<sup>2</sup>

The protection of trade-dress originates from the conventional understanding of trademark and common law doctrine of passing-off that *'protect the distinctive visual appearance of goods and services as a source identifier.'*<sup>3</sup> The fundamental premise behind the protection of trade-dress was the idea of consumer association with certain visual cues such as packaging, color schemes, or product shapes with a specific producer.<sup>4</sup> The imitation of these cues could result in consumer deception or confusion.<sup>5</sup> Internationally, trade-dress protection is indirectly recognized through conventions such as Agreement on the Paris Convention for the Protection of Industrial Property ("Paris Convention"), Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the Madrid Agreement Concerning the International Registration of Marks ("Madrid Agreement").<sup>6</sup>

In the Indian context, similar to international regime, The Trade Marks Act, 1999 of India does not expressly recognise trade-dress as an independent category of protection. It's protection has therefore evolved primarily through passing-off actions and judicial interpretation of the broad definitions of "mark" and "trade mark". Courts frequently grapple with issues relating to distinctiveness, functionality and consumer perception, while also

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<sup>1</sup> Theodore H Davis Jr, 'Copying in the Shadow of the Constitution: The Rational Limits of Trade Dress Protection' (1996) 80 Minn L Rev 595 <https://scholarship.law.umn.edu/mlr/2408> accessed 10 May 2026.

<sup>2</sup> Anu Tiwari 'Passing Off and the Law on "Trade-dress" Protection: Reflections on Colgate v Anchor' (2005) 10 JIPR 480.

<sup>3</sup> *ibid*

<sup>4</sup> J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (5th edn, Thomson Reuters 2023) para 8:1

<sup>5</sup> *ibid*

<sup>6</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement); Paris Convention for the Protection of Industrial Property (adopted 20 March 1883, revised at Stockholm 14 July 1967) 828 UNTS 305; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (adopted 27 June 1989, entered into force 1 December 1995) 1891 UNTS 299

confronting overlaps with copyright and design law. These complexities, combined with divergent approaches adopted by different High Courts, have produced an uneven and sometimes unpredictable body of law. Trade-dress protection in India has developed primarily through the common law action of passing-off, which, unlike the remedy of trademark infringement pre-supposing a valid registration, requires no such prior registration and are inherently flexible.<sup>7</sup> Against this backdrop, a systematic examination of trade-dress jurisprudence in India becomes necessary to map judicial trends, identify doctrinal inconsistencies, and evaluate the need for a more coherent framework for trade-dress protection.

The present study in Part II and III explores doctrinal and conceptual foundations of trade-dress in the Indian context addressing the lacunae of a statutory definition and the judicial confusion between trade-dress and artistic works. In Part IV the paper analyses the approach of the Supreme Court of India and maps the case-laws directly pertaining to conceptualisation of trade-dress and postulates the reasons behind the sparse number of cases litigated before the Supreme Court due to higher instances of settlement of trade-dress related litigation before the High Courts. In Part IV, there is a comparative judicial mapping of trade-dress protection across four major Indian High Courts – Calcutta, Bombay, Delhi and Madras. In Part V, the focus is on the identification and analysis of the core doctrinal principles consistently invoked by the Indian Courts while adjudicating trade-dress infringement disputes. The study advocates for an urgent need to resolve doctrinal incoherence across the Indian courts and proposes ‘Functional Market Typology of Trade-Dress Application’.

## **2. UNDERNEATH THE SURFACE: THE DOCTRINAL CORE OF TRADE-DRESS PROTECTION**

### **2.1.DECODING THE VISUAL ARCHITECTURE OF TRADE-DRESS**

Trade-dress conventionally embodies the arrangement of identifying characteristics or decorations connected with a product whether by packaging or otherwise that makes the source of the product distinguishable from competitors in the market and promotes the sale of the products.<sup>8</sup> The rationale behind the protection of trade-dress is to facilitate customer recognition of products and services and to preserve the goodwill associated with the producers of such products and services.<sup>9</sup> Trade-dress rights in a product’s design are not intended to

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<sup>7</sup> *Wal-Mart Stores, Inc v Samara Bros, Inc* 529 US 205, 209 (2000)

<sup>8</sup> *ibid*

<sup>9</sup> American Law Institute, Restatement (Third) of Unfair Competition (1995) § 16 cmt a

create rights similar to patents in the innovative aspects of product design because trade-dress extends only to the incidental, arbitrary or ornamental product features which identify the product's source.<sup>10</sup> In the retail store context, trade-dress encompasses interior and exterior architectural motif and décor, signage, menu, cuisine, sales technique, or entertainment features – anything and everything that may play a role in what is loosely identified as a business' atmosphere.<sup>11</sup>

Since a trade-dress can encompass everything from product packaging to building design, both retail and non-retail elements can contribute to its overall composition. Establishing a claim of trade-dress infringement requires that the claimant must demonstrate that the trade dress is distinctive (or has acquired secondary meaning), non-functional (the feature must not be essential to the use or purpose of the product), and that the use by the defendant gives rise to a likelihood of confusion as to the source of the goods or services.

## 2.2.THE REQUIREMENT OF DISTINCTIVENESS

One of the requisites for trade-dress protection is the requirement of 'distinctiveness', that is, the feature must be able to indicate the source of the product.<sup>12</sup> Distinctiveness implies that the trade-dress is capable of distinguishing one producer's goods or services from those of another.<sup>13</sup> A trade-dress is only distinctive if it functions as a symbol of origin for the products or services sold by the business.<sup>14</sup> Generally, the more distinctive a trade-dress is, the greater is the likelihood of protection and as a result the courts across jurisdictions have established different levels of distinctiveness. The various levels of distinctiveness along with their broad characteristics and descriptions with few examples have been tabulated below:

S. No	Level of Distinctiveness	Associated Characteristics	Example
1.	Fanciful/Arbitrary Trade-dress	<ul style="list-style-type: none"> <li>Visual features that are invented, wholly non-functional and unexpected in a particular category of goods or services.</li> </ul>	





<sup>10</sup> *Traffix Devices, Inc v Marketing Displays, Inc* 532 US 23, 29 (2001)

<sup>11</sup> *Fuddrucker, Inc v Doc's B.R. Others, Inc* 826 F 2d 837, 842 (9th Cir 1987)

<sup>12</sup> *Two Pesos, Inc v Taco Cabana, Inc* 505 US 763, 774 (1992)

<sup>13</sup> *ibid*

<sup>14</sup> (n 7)

		<ul style="list-style-type: none"> <li>• Rare in practice since product design is seldom fabricated purely for source-identification.</li> <li>• Highest Level of Distinctiveness</li> </ul>	
2.	Inherent Distinctiveness	<ul style="list-style-type: none"> <li>• These trade-dresses are unusual, unique and create a distinct visual impression.</li> <li>• Inherently distinctive trade-dresses need not have secondary meaning to be protected.</li> <li>• A proof of inherent distinctiveness ends the distinctiveness inquiry.</li> </ul>	
3.	Secondary Meaning	<ul style="list-style-type: none"> <li>• Even if a product's design is not inherently distinctive, its manufacturer can satisfy the distinctiveness requirement by proving secondary meaning.</li> <li>• A product's trade-dress has secondary meaning when, due to the exposure to the mark, the relevant consumer comes to view the mark as an indication of the source of the product.</li> <li>• Secondary meaning is usually proved by the evidence of significant advertising, high sales and surveys highlighting consumer association with a particular source or product.</li> </ul>	
4.	Generic Trade-dress	<ul style="list-style-type: none"> <li>• Visual features that are commonplace in the industry or dictated by the convention.</li> <li>• Such trade-dress are not protectable in nature even with advent of robust advertising.</li> </ul>	

The classification of distinctiveness adopted here is derived from the spectrum developed by the United States Court of Appeals for the Second Circuit in *Abercrombie & Fitch Co. v. Hunting World, Inc.* 537 F.2d 4 (2d Cir. 1976) and subsequently extended to trade-dress in trademark jurisprudence, as reflected in leading commentaries such as McCarthy on Trademarks. The spectrum of distinctiveness determines whether trade-dress is capable of protection, and the evidentiary burden required for establishing it. This inquiry is one part of the analysis, and the courts must also ensure that the protection does not extend to the functional features, preventing an undue monopoly over utilitarian, or aesthetically necessary elements.

### 2.2.1. THE REQUIREMENT OF NON-FUNCTIONALITY

Functional features of goods or services that are utilitarian in nature form an integral part of a franchise's branding.<sup>15</sup> The use of a delivery van, a drive-through window or shrink wrapping may identify a franchise uniquely but these facets do not aid in the practical operations of the business.<sup>16</sup> These unique features are not, in and of themselves, protectable trade-dress.<sup>17</sup> The purpose of non-functionality rule is preventing the misuse of trade-dress rights to protect inventions or other useful designs from competition, either after a patent has expired or perhaps without the benefit of a patent at all.<sup>18</sup> The courts impose the requirement of non-functionality to the trade-dress protection in order to foster competition and prevent businesses from monopolizing the useful product features. Trade-Dress protection is limited to non-functional features that primarily serve as source identifiers, distinguishing the origin of goods or services rather protecting their utilitarian aspects. The Protection of useful product features falls within the ambit of patent law and such protection under the patent regime is granted only for a limited time.<sup>19</sup> Since trademarks can be renewed, the functional features of the product can be renewed in perpetuity and monopolized by a business, rendering the market devoid of competition and a level-playing field.<sup>20</sup> Non-functional trade-dress must primarily serve as the source-identifier for goods and services.<sup>21</sup> Scott C. Sandberg outlines a number of

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<sup>15</sup> J Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (5th edn, Thomson West 2023) § 7:63

<sup>16</sup> *ibid*

<sup>17</sup> n (10)

<sup>18</sup> *Qualitex Co v Jacobson Prods Co* 514 US 159, 164-65 (1995)

<sup>19</sup> *Bonito Boats, Inc v Thunder Craft Boats, Inc* 489 US 141, 150-51 (1989)

<sup>20</sup> n (10)

<sup>21</sup> n (12)

useful guidelines for identifying a functional and non-functional trade-dress that has been reproduced in the table below:<sup>22</sup>

Characteristics of Non-Functional Trade-Dress	Characteristics of Functional Trade-Dress
<ul style="list-style-type: none"> <li>• Purely aesthetic trade-dress</li> <li>• Non-functional trade-dresses contain features that do nothing to improve the usefulness, efficiency, or appeal of a product or service, nor such features related to consumer demand for the good or service</li> <li>• Color is generally deemed to be non-functional in nature if it serves the franchise’s overall layout and décor</li> <li>• Trade-Dress shall be deemed non-functional if the competitors are not prevented from using a variety of comparable alternative features</li> </ul>	<ul style="list-style-type: none"> <li>• Aesthetic Functionality serves as an exception if the visual feature bestows some utility</li> <li>• In some cases, the US Courts have held that color can be functional</li> <li>• Features that make a product or service cost less or have a higher caliber</li> <li>• Trade-Dress shall be deemed functional if the competitors are prevented from using a variety of comparable alternative features</li> <li>• Trade-Dress is also functional in nature if it represents the best design for a feature or if there are few superior designs available</li> <li>• Concepts such as quick service restaurants (QSRs) are functional</li> </ul>

Scott Sandberg notes that trade-dress made up of purely ornamental features, serving no purpose other than identifying source is more likely to satisfy the non-functionality requirement than trade-dress composed entirely of functional elements.<sup>23</sup> Non-functionality ensures the prevention of the monopolies in trademark law. The courts tread the protection rather cautiously. Ornamental and source identifying features are deemed as protectable elements of trade-dress whereas utilitarian or industry-standard design practices remain non-competitive and free for all businesses alike. Having established protectable qualities, the inquiry naturally shifts to how infringement is determined vis-à-vis the assessment of likelihood of confusion: a crucial pillar of trade-dress litigation that hinges more on consumer perception of a good or service in the marketplace.

### 2.2.2. THE REQUIREMENT OF LIKELIHOOD OF CONFUSION

<sup>22</sup> Scott C Sandberg, 'Trade-dress Protection for Product Configurations: Is There a Conflict with Patent Policy?' (1995) 24 AIPLA QJ 427, 432-35

<sup>23</sup> *ibid*

The core inquiry of trade-dress infringement litigation is a demonstration by the plaintiff of a likelihood of confusion between the marks of the plaintiff and the defendant.<sup>24</sup> The core elements in proving confusion as stated in the most important and well-regarded *Polaroid case* in the United States include the following factors:

*the degree of similarity between the conflicting marks, the similarity of marketing methods and distribution channels, the characteristics of the consuming public and how careful they typically are when making purchases in the relevant product category, the extent to which a mark is distinctive, the perceived likelihood of expansion into the territory and the extent of entry into the sales' territory and lastly, the evidence of actual confusion.*<sup>25</sup>

Although originally articulated in the context of trademark infringement, the test developed in *Polaroid* has been widely applied to trade-dress claims. The test thus evaluates whether the similarity in trade dress is likely to mislead consumers into believing that the defendant's goods or services originate from, or are associated with, the plaintiff. These factors are weighed by the court to determine whether the element of likelihood of confusion has been demonstrated and if such confusion entitles the plaintiff to seek damages from the defendant for assessing trade-dress infringement.<sup>26</sup> This evaluative framework ensures that trade-dress protection remains anchored in consumer perception and the preservation of fair competition.

While the *Polaroid* framework provides the judicial mechanism for determining whether the imitation of the overall appearance of the product is likely to cause consumer confusion. The legitimacy of trade-dress protection is reinforced by international principles governing industrial property and unfair competition. Although trade-dress is not expressly codified as an independent category under early international intellectual property law, instruments such as the Paris Convention and TRIPS agreement furnish the normative basis from which such protection has progressively developed.

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<sup>24</sup> *Polaroid Corp v Polarad Electronics Corp* 287 F 2d 492, 495 (2d Cir 1961)

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

### 2.3. INTERNATIONAL IP REGIME FOR TRADE-DRESS PROTECTION

Internationally, trade-dress protection has evolved not through explicit recognition, it is protected through conventions such as TRIPS Agreement and the Paris Convention.<sup>27</sup> The Paris Convention forms the ancestral stones in the edifice of modern trade-dress protection.

The Paris Convention does not directly address the advent of ‘trade-dress’; however the convention adopts a rather broader understanding of the constituents of the industrial property.<sup>28</sup> Article 1(2) of the Paris Convention states that “*the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.*”<sup>29</sup> Further, Article 1(3) of the Paris Convention provides that the “*industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beers, flowers and flour.*”<sup>30</sup>

Paris Convention in Articles 1(2) and 1(3) create a conceptual apparatus for the incorporation of trade-dress protection.<sup>31</sup> Article 1(2) defines the objects of ‘*industrial property*’ broadly albeit ranging from patents and industrial designs to trademarks and the repression of unfair competition.<sup>32</sup> Even though the list does provide for a set of enumerated elements, it is neither exhaustive nor rigid in nature.<sup>33</sup> Article 1(3) takes a different trajectory and widens the canvas of trade-dress protection considerably.<sup>34</sup>

By emphasizing that *industrial property* shall be understood “*in the broadest sense*” and by the extension of protection to all manufactured or natural products across the multifarious sectors, the Convention signals towards a marked flexible approach and interpretation of trade-dress. This breadth of coverage implies a rather futuristic approach and includes any possible feature capable of influencing market identity or competitive conduct

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<sup>27</sup> (n 6)

<sup>28</sup> Paris Convention (n 6)

<sup>29</sup> Paris Convention (n 6) art 1(2)

<sup>30</sup> Paris Convention (n 6) art 1(3)

<sup>31</sup> Paris Convention (n 6) arts 1(2), 1(3)

<sup>32</sup> Paris Convention (n 6) art 1(2)

<sup>33</sup> GHC Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property (United International Bureaux for the Protection of Intellectual Property 1968)* 21-22

<sup>34</sup> Paris Convention (n 6) art 1(3)

may fall within the ambit of protection. Read conjunctively, Articles 1(2) and 1(3) enable an interpretation under which trade-dress protection forms an organic extension of the structural principles of the Paris Convention. Article 10bis (3) of the Paris Convention also ensures that ‘any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.’<sup>35</sup> Article 10bis (3) of the Paris Convention prohibits the following acts:

- “1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;*
- 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;*
- 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”*

As noted in the WIPO Report, this provision includes a broad range of industrial or commercial indicia, including distinctive product or services characteristics, geographical indications, descriptive brand names, trade-dress, packaging design, the overall appearance of goods, colour schemes, fictional characters, (aspects of) celebrity images, marketing themes, and the layout of websites.<sup>36</sup> This category has included a multi-layered protection for commercial signifiers such as packaging design, get-up, colour ensembles, label architecture, store layout, digital interface layout and even recurring marketing motifs. The second category of prohibited acts enshrined in the Article 10bis(3)(2) targets comparative advertising that discredits a competitor in the form of imitation of the elements of the trade-dress.<sup>37</sup> The second category also addresses acts of omissions wherein a trader may partially adopt a competitor’s trade-dress but strategically omits quality seals, regulatory cues, or safety-related colour coding may create false impressions that discredit the original.<sup>38</sup> The third category of prohibited acts enshrined in the Article 10bis(3)(3) of the Paris Convention includes the use of the misleading

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<sup>35</sup> Paris Convention (n 6) art 10bis(2)

<sup>36</sup> Martin Senffleben, Status Report on the Protection Against Unfair Competition in WIPO Member States (WIPO/STrad/INF/8 PROV, 1 November 2022) <https://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo-strad-inf-8-prov.pdf> accessed on 10 May 2026.

<sup>37</sup> *ibid*

<sup>38</sup> *ibid*

indications or allegations with regard to a trader's own goods.<sup>39</sup> The criteria of a misleading indication further requires to be supplemented by the national or regional law that lays down the additional criteria of unfairness.<sup>40</sup> The dual rationale of consumer protection and competition protection fits trade-dress cleanly: a misleading imitation harms both the integrity of consumer choice and the competitive position of the trade-mark proprietor.

In this framework, trade-dress infringement is not merely an aesthetic trespass; it is a distortion to the competitive signals, an interference with how markets communicate authenticity, quality and origin. For example, where a competitor closely imitates the distinctive packaging and colour scheme of a well-known product, consumers may be led to believe that the goods originate from the same source. Such imitation undermines the informational function of trade dress by blurring the link between product appearance and commercial origin. It must be highlighted herein that the provisions of the Article 10*bis* are supplemented by Article 10*ter* which provides for appropriate legal remedies capable of effectively repressing acts of unfair competition.<sup>41</sup> Article 10*ter* acts as the enforcement backbone, obligating the members to furnish effective remedies, thereby operationalising the Convention's objective to tackle unfair competition through robust tools.

The Madrid Protocol facilitates the international registration of trademarks inter-alia trade-dress, it remains procedural rather than substantive, and does not explicitly address trade-dress. The relevance of Madrid Protocol to trade-dress is indirect, and operates only insofar as certain elements of trade-dress may be registered as trademarks under domestic laws. The primary purpose of the Madrid Protocol relates to administrative convenience as it enables the trademark proprietors to seek protection in several member states without filing separate national applications in each country. The Madrid Protocol neither creates independent substantive rights in trademarks nor recognises trade-dress as a distinct subject matter of protection.

Building on norms spanning over a decade, the Paris Convention and the Madrid Protocol, and the TRIPS Agreement has generated considerable discourse on trademark law

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<sup>39</sup> *ibid*

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

reforms across the world.<sup>42</sup> Under the TRIPS Agreement, as per Article 15, a ‘trademark’ is defined broadly as:

*“...Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.”<sup>43</sup>*

TRIPS allows member states to mandate that trademarks be visually perceptible and capable of distinctiveness, either inherently or acquired through use.<sup>44</sup> Notably, similar to Paris Convention, TRIPS does not explicitly address trade-dress or product packaging, creating ambiguity regarding the extent to which these features are protected.<sup>45</sup> Article 15.2 of the TRIPS Agreement allows countries to deny registration of trademarks on other grounds<sup>46</sup>, provided that such denial does not contravene the Paris Convention.<sup>47</sup> During the negotiations, member states were unable to arrive at a consensus on whether trade-dress, including product packaging, should fall within the ambit of trademark protection.<sup>48</sup> The term “trademark” was left deliberately undefined, granting nations flexibility to shape their own policies regarding the protection of product appearance and related features.<sup>49</sup> Whether a country can decline to protect product packaging trade-dress under the TRIPS Agreement, therefore, depends on the international consensus achieved in the Paris Convention.<sup>50</sup> Notwithstanding the TRIPS

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<sup>42</sup> Peter K Yu, ‘The Changing Contours of International Protection for Trade-dress’ (Forthcoming, Florida State University Business Review, 2025) < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5085305](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5085305)>

<sup>43</sup> TRIPS Agreement (n 6) art 15(1)

<sup>44</sup> TRIPS Agreement (n 6) art 15(1) and (4)

<sup>45</sup> Christine Haight Farley and Irene Calboli, ‘The Trademark Provisions in the TRIPS Agreement’ in Carlos M Correa (ed), *Intellectual Property and International Trade: TRIPS Agreement* (3rd edn, Wolters Kluwer 2016)

<sup>46</sup> Such grounds typically include, inter alia, lack of distinctiveness, descriptiveness or genericness of the mark; functionality of the sign; conflict with prior rights (including earlier trademarks or well-known marks); likelihood of confusion or deception; use of prohibited or scandalous matter; and considerations of public policy or morality.

<sup>47</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 art 15(1), (2).

<sup>48</sup> Irene Calboli and Jane C Ginsburg (eds), *Comparative Perspectives on Trademark Protection: Convergence and (Remaining) Divergence in The Cambridge Handbook of International and Comparative Trademark Law* (Cambridge Law Handbooks, Cambridge University Press 2020) 159

<sup>49</sup> n (42)

<sup>50</sup> *ibid*

Agreement's lack of explicit coverage for product packaging trade-dress, many WTO members already protected trade-dress protection before the adoption of the Agreement.<sup>51</sup> On the issue of increase in trade-dress protection, Peter K. Yu has highlighted that despite continuous expansion of trademark protection in the past three decades, the applications for product packaging trade-dress have not increased significantly.<sup>52</sup> Yu further observes that trade-dress continue to face challenges with respect to both the requirement of distinctiveness and the functionality limitation.<sup>53</sup>

The Paris Convention and the TRIPS Agreement are the main foundations of international law for trade-dress while Madrid Protocol provides auxiliary protection. However, their protection is more implied than express. This has created an international system that is creative but fragmented. It offers many principles but lacks clear guidelines. Trade-dress has developed in this grey area and has not been formally recognized as a type of intellectual property, but as a natural extension of broader ideas that protect commercial identity and market transparency. The emerging challenge, especially in the digital markets, is whether these flexible yet historically framed treaty regime can adequately adapt to new forms of digital interfaces, UI layouts, app icons and e-commerce presentation formats in the absence of clear global harmonisation. Against this evolving international context, the next section examines Indian legal responses to trade-dress protection.

### 3. FRAMEWORK OF INDIAN TRADE-DRESS LAW

#### 3.1. STATUTORY FRAMEWORK AND THE SILENCE ON TRADE-DRESS IN TRADE-MARKS ACT, 1999

The Indian Trade Marks Act, 1999 does not define a “*trade-dress*”.<sup>54</sup> The concept of trade-dress has been incorporated within the definition of “*trademark*” under Section 2 (zb).<sup>55</sup> Section 2 (zb) defines “*trademarks*” as:

*“trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours”.*<sup>56</sup>

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<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

<sup>54</sup> Trade Marks Act 1999

<sup>55</sup> Trade Marks Act 1999 s 2(zb)

<sup>56</sup> *ibid*

And “*mark*” is defined under Section 2 (m) as:

*“mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof”*.<sup>57</sup>

Further, Section 2 (q) of the Trade Marks Act, 1999 defines “*package*” as:

*“package includes any case, box, container, covering, folder, receptacle, vessel, casket, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork”*.<sup>58</sup>

A conjoint reading of definitions of *trademark* and *package* demonstrates that the Trade Marks Act, 1999 contemplates an expansive conception of protectable signifiers, recognising an extensive array of visual, structural and presentational features as protectable source identifiers. Although the statute falls short of articulating a composite category called ‘trade-dress’, the breadth of these definitions provides the basis upon which the courts have formulated the doctrine of protection of the ‘*overall look and feel of the goods*’ pertaining to trade-dress litigation.

This recognition of trade-dress as capable of performing a trade-mark function, even in the absence of registration, necessarily shifts the enforcement of such rights into the domain of law related to passing-off actions.<sup>59</sup>

In passing-off claims, the Indian Courts examine the competing trade-dress holistically, to determine, at a prima facie stage, whether the competing trade-dresses cause a likelihood of confusion.<sup>60</sup> Rising consumerism and evolving marketing practices have led to a gradual shift in the Indian Courts’ approach to the cases pertaining to the trade-dress infringement.<sup>61</sup> The courts have granted injunctions or restraining orders in cases of competing parties using similar trade-dress.<sup>62</sup> This jurisprudential shift reflects a judicial commitment to preserving the distinctiveness of trade-dress configurations in an increasingly competitive marketplace.

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<sup>57</sup> Trade Marks Act 1999 s 2(m)

<sup>58</sup> Trade Marks Act 1999 s 2(q)

<sup>59</sup> See also, Narula R and Kumar D, ‘India: Trade-dress and the importance of visual appearance’ World Trademark Review (1 May 2017) <<https://www.worldtrademarkreview.com/article/india-trade-dress-and-the-importance-of-visual-appearance>>

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> *ibid*

Yet this interpretative flexibility of Section 2 of Trade Marks Act, 1999 is curtailed by the twin practical constraints of distinctiveness and functionality. By and large, the Indian courts firmly reject the appropriation of functional or utilitarian features through trade mark law and non-traditional signifiers such as shape, packaging, colour require a rigorous proof secondary meaning. Compounding this constraint is the way judicial tests such as overall similarity, anti-dissection, initial interest confusion, and imperfect recollection are deployed. Moreover, on digital interfaces and contemporary modes of product presentation the Trade-Mark statute lacks a definitive viewpoint, compelling the courts to stretch the traditional trademark categories. In effect, these constraints illustrate that the breadth of Section 2 of the Trade Marks Act, 1999 only offers a skeletal framework for trade-dress protection. The jurisprudence on trade-dress law in the Indian context continues to develop in a piecemeal and often unpredictable manner. These interpretative limitations are most palpably exposed when the Courts are confronted with claims involving non-traditional signifiers.<sup>63</sup> This results in a persistent confusion between trade-dress, artistic works and industrial designs.

### 3.2. CONFUSION BETWEEN TRADE-DRESS, ARTISTIC WORK & DESIGN

The Indian courts have long approached disputes over trade-dress with an uneasy toolkit, as though standing before an object whose legal identity keeps slipping between the margins of various categories. For instance, the curve of a bottle might entice one to classify it as ‘trade-dress’, its blueprint may lead one to perceive it as ‘artistic work’, while the mass production of the bottle may inch one to conceptualise the bottle as a ‘design’. Faced with quagmire of such polyphonic objects, the judicial decisions in India often collapse the neighbouring intellectual property regime. The product is perhaps an ambiguous and distorted jurisprudence where form, function and source identification converge into each other and the boundaries between the distinct concepts of passing off, copyright and design intersect and get blurred. This doctrinal perplexity is not entirely astounding.

To put in context, when a manufacturer shapes a bottle into a distinctive silhouette or when a consumer goods company adopts a particular combination of colours and geometry for its packaging, the manufacturer is creating a packaging or label that may qualify as an ‘*artistic*

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<sup>63</sup> Non-traditional signifiers refer to those commercial indicia that fall outside the conventional categories of trademarks such as words, letters, numerals, logos, or pictorial devices. As commercial markets and branding has evolved, courts and intellectual property regimes have increasingly acknowledged that consumers often associate origin not merely through names or logos, but through the sensory and visual impression conveyed by packaging, product configuration, colour schemes, retail ambience, or design composition.

*work*, the application of such creation through may occur through an *'industrial process'*, and lastly, the resultant trade-dress may become a hallmark of visual identity that acts a source-identifier for consumers in the marketplace. Each of these actions engage a different body of law. The Copyright Act, 1957 corresponds to the element of artistic work, the Designs Act, 2000 corresponds to the industrial application, and lastly, the Trade Marks Act, 1999 protects the source-identifying function of such trade-dress.

The Copyright Act, 1957 offers the broadest protection since the protection applies automatically without any separate registration, and extends for the life of the author plus a period of sixty years. Section 2 (c) of the Copyright Act, 1957 enumerates the contours of artistic works defining *'artistic works'* as,

*“a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality, an work of architectural and any other work of artistic craftsmanship.”*<sup>64</sup>

The two features of this definition of artistic work under Section 2 (c) are particularly instructive for the litigants in claims of trade-dress protection.<sup>65</sup> First, the definition is inclusive rather exhaustive and that the phrase “any other work of artistic craftsmanship” operates as a residual category that can accommodate emergent forms of creative expression that do not fit nearly within the enumerated classes.<sup>66</sup> Second, the legislature has expressly dispensed with any requirements of inherent artistic quality for the enumerated categories.<sup>67</sup> This liberal definition has essentially transformed Section 2 (c) of the Copyright Act, 1957 as a potent tool for litigants to protect their commercial interests by the long and registration free protection of copyright law. The Section 15 of the Copyright Act, 1957 operates as a statutory cut-off, a point at which the generous and registration-free protection of copyright is deliberately withdrawn and the proprietor is redirected to the regime under the Designs Act, 2000.<sup>68</sup> The statutory cut-off contained in Section 15 of the Copyright Act, 1957 marks the interface between copyright and design law in India.<sup>69</sup> Section 15 (1) of the Copyright Act, 1957 provides that copyright shall not subsist in any design that is registered under the Designs Act, 2000.<sup>70</sup> Section 15 (2)

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<sup>64</sup> Copyright Act 1957, s 2(c)

<sup>65</sup> *ibid*

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

<sup>68</sup> Copyright Act 1957, s 15

<sup>69</sup> *ibid*

<sup>70</sup> Copyright Act 1957, s 15(1)

of the Copyright Act, 1957 provides that if any design capable of being registered under the Designs Act, 2000 is not registered under the Designs Act, 2000, copyright in such design shall cease once the article to which the design is applied has been reproduced more than fifty times by an industrial process.<sup>71</sup> This provision prevents perpetual copyright protection over industrial designs and ensures that mass-produced commercial features. It ensures that mass-produced commercial features do not receive long-term copyright protection and are instead subject to the shorter, specialised regime under design law. For example, a decorative product design such as the design pattern in *hand-bags* used in mass manufacturing cannot be protected indefinitely under copyright and, once industrially applied, it falls within design law and is subject to a limited term of protection. While artistic elements of trade-dress may initially qualify as artistic works under Section 2(c) of the Copyright Act, 1957, once such features are applied industrially and reproduced in large quantities, copyright protection is extinguished and the proprietor must seek protection under design law. This ensures a balance between copyright and design protection and prevents overlapping monopolies. The Designs Act, 2000 assumes significance as the primary legal regime governing the protection of industrially applied trade-dress.<sup>72</sup> The true object of the Designs Act, 2000 is that monopoly is for a limited period of time and after the expiry of the ten year term, the public can freely use the shape of the article.<sup>73</sup>

As a result, the courts often confront porous and overlapping claims of protection. In *L'oreal India (P) Ltd. v. Henkel Marketing India Ltd.*, L'oreal launched a mid-range product segment to target sales in urban/semi urban ranges and gained a substantial share in the Indian Hair Colour Market.<sup>74</sup> L'oreal in this case claimed that the designing agency engaged by them had copyright in the “*artistic design, trade-dress*”.<sup>75</sup> L'Oréal alleged that Henkel Marketing India Ltd. had infringed the copyright subsisting in the artistic label and trade-dress of its hair colour packaging, which had been created by an independent designing agency engaged by L'Oréal. Noting the differences between two products, the Bombay High Court held that the label/trade-dress of the Henkel Marketing was not a substantial reproduction of the label/trade-dress of the L'oreal and hence, it cannot be said that copyright of the L'oreal was infringed. The court treated “*artistic design, trade-dress*” as if it were a copyright category, applying the

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<sup>71</sup> Copyright Act 1957, s 15(2)

<sup>72</sup> Designs Act 2000

<sup>73</sup> *ibid*

<sup>74</sup> *L'oreal India (P) Ltd. v. Henkel Marketing India Ltd.*, 2005 SCC OnLine Bom 969

<sup>75</sup> *ibid*

“substantial reproduction” test.<sup>76</sup> Similarly in the case of *Unilever Plc v. Vikas Sachdeva*, while dissecting the facts the Bombay High Court noted that Lakme had appointed a designing agency to design a new original artwork to be used in respect of its LAKMÉ NINE TO FIVE (9 to 5) range of cosmetic preparations.<sup>77</sup> The Court held that there was an infringement of the copyrights in the artistic works and Lakme’s trademark.<sup>78</sup> The Court here recognised an “original artwork” for Lakme 9 to 5 range but then used that very observation as a proof of trade-mark infringement. The Court erroneously assumed that just because an artwork is original for copyright, it is automatically distinctive for trademark, which has been mistakenly considered synonymous. In *Kellogg Co. v. Pravin Kumar Bhadabhai*, a reference was made on the grounds of appeal to the carton being a piece of artistic work within Section 2 (c) of the Copyright Act, 1957 though the arguments were mainly focused on trade-dress.<sup>79</sup>

In *Dabur India Ltd. v. Rhim Pharmaceuticals*, the Delhi High Court visually compared the two competing bottles and found that the bottle by Rhim Pharmaceuticals was deceptively similar to the registered design of the Dabur and trade-dress of the product.<sup>80</sup> The Court treated design registration and trade-dress as mutually reinforcing rights rather mutually exclusive statutory regimes. In the case of *V Guard Industries Ltd. v. Venigandla Sreekanth*, the Delhi High Court held that Venigandha Sreenkanth will never infringe the design/trademark/copyright in its said trade-dress or pass off its products.<sup>81</sup> The court’s blanket declaration that the defendant will ‘never infringe design/trademark/copyright collapses three distinct statutory regimes into a single injunction’ without analysing the merits of each right. In *Reckitt Benckiser (India) Private Limited v. Godrej Consumer*, Calcutta High Court highlighted that “the cancellation of the design monopoly per se does not necessarily mean that there can be no trade mark monopoly on the registered mark or recognition of a mark or its distinct indicia in a passing off action.”<sup>82</sup>

In these cases, the recurring difficulty appears to be conceptual rather than factual. Indian courts frequently treat trade-dress, design, packaging, colour and layout as a single

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<sup>76</sup> ‘Substantial reproduction’ test examines whether the defendant has copied a substantial and material part of the plaintiff’s work, focusing on qualitative rather than quantitative similarity, and does not require proof of consumer confusion or source identification.

<sup>77</sup> *Unilever Plc v. Vikas Sachdeva*, 2020 SCC OnLine Bom 8822

<sup>78</sup> *ibid*

<sup>79</sup> *Kellogg Co. v. Pravin Kumar Bhadabhai*, 1996 SCC OnLine Del 170

<sup>80</sup> *Dabur India Ltd. v. Rhim Pharmaceuticals*, 2014 SCC OnLine Del 3185

<sup>81</sup> *V Guard Industries Ltd. v. Venigandla Sreekanth*, 2023 SCC OnLine Del 7674

<sup>82</sup> *Reckitt Benckiser (India) (P) Ltd v Godrej Consumer Products Ltd* (Calcutta High Court, 25 February 2026)

amorphous category of product presentation, without clearly articulating the doctrinal basis for applying a particular intellectual property regime at each stage of adjudication. The doctrinal tests are often deployed interchangeably, with sparse justification for alternating between legal frameworks. A notable manifestation of this approach is the treatment of the copyright-design interface. While the statutory framework provides that copyright protection stands exhausted once an artistic work is industrially applied beyond the prescribed threshold, the judicial analysis reflects a pragmatic approach with the courts holistically applying the principles of copyright, design and trade-dress protection in order to capture the composite nature of commercial presentation. A number of practical considerations may explain this judicial tendency to allow overlap between copyright, design and trade-dress regimes. From the perspective of litigation strategy, the plaintiffs often dress up trade-dress protection disputes as copyright infringement actions because copyright protection provides stronger remedies in the form of statutory damages, injunctions, and account of profits. Another practical reason for the interchangeable application of these regimes is rather procedural: copyright claims are often well-suited for securing interim injunctions at an early stage of litigation because the court can rely on bare visual similarity and reproduction rather than detailed market surveys or evidence of consumer confusion.

In light of these overlapping statutory frameworks, the contours of trade-dress protection in India have largely been shaped through judicial interpretation. The Indian Courts have played a central role in determining how elements such as packaging, product configuration, colour combinations and overall visual presentation may function as indicators of commercial origin. The following section therefore examines the nature and trajectory of judicial engagement with trade-dress protection in India.

#### **4. THE JUDICIAL ENGAGEMENT ON TRADE-DRESS PROTECTION IN INDIA**

The Supreme Court of India has engaged with the trade-dress jurisprudence in a notably limited number of cases. The architecture of trade-dress protection has largely been shaped through High Courts, with concentration of the litigation at the Delhi High Court. This concentration may be attributed to several factors, including Delhi's status as a preferred dispute settlement and commercial hub, the presence of specialized intellectual property benches, the court's procedural efficiency in granting interim relief, and its reputation for developing a robust and influential body of intellectual property jurisprudence. The analysis proceeds along two inter-related axes: *first*, the doctrinal mapping and trade-dress law principles discussed in the

judgments, and *second*, the litigation trajectory particularly the sparse incidences of trade-dress disputes before the Supreme Court and the impact of Supreme Court's limited engagement with trade-dress protection jurisprudence.

The High Court cases selected for this study were identified through legal databases such as SCC OnLine and Manupatra using keywords including *trade-dress, packaging, colour combination, product shape and layout*. The search was primarily limited to the judgments of the Delhi High Court, Bombay High Court, Madras High Court, and Calcutta High Court, as these courts have developed a substantial body of jurisprudence on trade-dress protection in the Indian context. This focus is justified on the ground that these courts represent the erstwhile Presidency High Courts, which historically handled significant commercial disputes, and continue to occupy an important position within the judicial hierarchy, often setting persuasive precedents for other High Courts. Other High Courts were not examined on account of the need to maintain a focused and manageable scope for analysis. The selection of cases was guided by three prongs of consideration. First, the cases were selected where the Courts engaged with the issues central to trade-dress protection. Second, the cases were chosen not to provide an exhaustive catalogue of all trade-dress protection judgments but to illustrate the broader judicial patterns within each High Court. Third, certain judicial decisions rendered prior to the enactment of the Trade Marks Act, 1999 have been referred as these cases are essential in tracing the historical evolution and doctrinal foundations of trade dress protection in India. The selected cases represent recurring commercial contexts such as FMCG packaging, pharmaceuticals, luxury goods, digital platforms, retail environments, and product design. The study focuses primarily on post-2000 decisions following the enactment of the Trade Marks Act, 1999. This study is limited to reported judgments and is therefore illustrative rather than exhaustive.

#### 4.1. The Supreme Court of India and Trade-Dress law

In addressing matters involving trade-dress protection, this section looks at how the Supreme Court of India developed important trademark principles. The mapping traces the Court's interpretive evolution through an analysis of *Parle Products (P) Ltd v. J.P. and Co*<sup>83</sup>., *S.M. Dyechem Ltd v. Cadbury (India) Ltd*<sup>84</sup>., *Ajanta LLP v Casio Keisanki Kabushiki Kaisha*<sup>85</sup>,

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<sup>83</sup> *Parle Products (P) Ltd v J P & Co*, Mysore AIR 1972 SC 1359

<sup>84</sup> *S M Dyechem Ltd v Cadbury (India) Ltd* (2000) 5 SCC 573

<sup>85</sup> *Ajanta LLP v Casio Keisanki Kabushiki Kaisha* (2022) 5 SCC 449

*and Pernod Ricard India (P) Ltd v Karanveer Singh Chhabra*.<sup>86</sup> These cases have been selected since they represent the most substantive decisions of the Indian Supreme Court on the law related to trade-dress over the course of time and across distinct commercial contexts.

To understand this trajectory in detail, it is instructive to begin with the Supreme Court's earliest engagement with trade-dress protection principles in *Parle Products (P) Ltd v J.P. and Co.*<sup>87</sup> The *Parle case* is an appeal before the Supreme Court from a Mysore High Court decision. The Plaintiffs (Parle) were biscuit manufacturers who owned registered trademarks including "Gluko" and "distinctive wrapper design". Parle claimed that their biscuits had established reputation and goodwill over many years. In 1961, Parle discovered that the defendants were selling biscuits in a similar wrapper, and they alleged infringement on the ground of deceptive similarity. The defendants denied infringement contending that their wrappers had distinct features and claimed a general unawareness of Parle's trademark registration. The Supreme Court agreed noting that there was no requirement to prove actual deception, there were noticeable key differences, and that the buyers of such biscuits were likely careful purchasers. The relevant paragraph of the judgment has been extracted below:<sup>88</sup>

¶5. *Although the High Court held that in such a case it was not necessary for the plaintiffs to adduce evidence that any particular individual had been deceived by the defendants' wrapper and it was undeniable that the general get up of the two wrappers was more or less similar; it went on to observe that the court had to bear in mind that it was dealing with packets of biscuits which were generally used by people of the upper classes, and a purchaser desirous of getting a packet of Parle biscuits would go and ask for the same as such, in which case there could be no scope for deceptions against the plaintiffs could have no cause for grievance if a purchaser was content to buy any biscuits which were offered to him by the shopkeeper. The High Court also took the view that there were several distinguishing features between the two wrappers, and these could be noticed even from a distance. According to the High Court the similarity in the two wrappers lay in the facts that both were partly yellow and partly white in colour and both bore the design of a girl and some birds. "But" the High Court said "there the similarity ends. The lady in the wrapper used by the plaintiff company has a pot on her hand*

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<sup>86</sup> *Pernod Ricard India Pvt Ltd v Karanveer Singh Chhabra* 2025 INSC 981

<sup>87</sup> n (83)

<sup>88</sup> *ibid*

*while the lady in the wrapper used by the defendant has a hay-bundle on her head. In fact, they are not identical in features. In the defendants' wrapper we have got a cow and in the plaintiffs' wrapper we have got two calves. The upper portion of the defendants' wrapper is not similar to that of the plaintiffs' wrapper". The High Court went on to comment:*

*"It is true that in a passing off action, one is not to look to minor details but must take into consideration the broad features. Even if we take the broad features of the two wrappers into consideration, we do not think that they are similar. At any rate, they are not so similar as to deceive an ordinary purchaser of biscuits."*

Be that as it may, the Supreme Court ultimately held defendant had indeed infringed the registered trademark of Parle:<sup>89</sup>

*¶11. In the result, we hold that the defendant had infringed the registered trademark the plaintiff and the suit of the plaintiff should be decreed and an injunction granted restraining the defendant respondent from selling or using in any manner whatsoever biscuits in wrappers similar in appearance to the registered trademark of the plaintiffs on their packets.*

The Supreme Court's observations and dichotomy of its final decision in *Parle Products* illustrate several foundational principles in trade-dress jurisprudence and highlight the early contours of the law of passing-off in the Indian context. The Court acknowledged that the color scheme, graphics, and layout of the wrapper as a whole form an integral part of the product's identity. According to the court, plaintiffs did not have to prove that a particular person had been deceived. This illustrates the idea that, in passing-off cases, the probability of deception within the relevant buyer class rather than evidence of genuine confusion is adequate. This reflects the preventive orientation of passing-off law: the plaintiff need only show a reasonable likelihood that the defendant's misrepresentation would deceive the relevant class of consumers, not that deception has already in fact. This is consistent with early trademark law, which gives weight to general patterns of similarity rather than anecdotal evidence. The ruling established a theoretical basis for the subsequent explicit recognition of trade-dress in Indian law, essentially treating visual packaging and presentation as protectable sources of goodwill even if the

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<sup>89</sup> *ibid*

word "trade-dress" had not yet been employed in the judgment. Despite differences (*pot vs. hay-bundle, one cow vs. two calves*), the Supreme Court showed a practical balancing technique by issuing the injunction. The Court supplemented the reasoning by observing:

*“It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the color scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farmhouse with a fence. The word "Glucobiscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets to-day may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each case will have to be, judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it.”*

A fundamental tenet of modern trade-dress litigation; the emphasis *shifted sharply from small, extremely technical differences to possible consumer confusion* in the marketplace. Despite the identification of certain points of visual dissimilarity between the

rival wrappers, the Supreme Court did not permit these isolated differences to overshadow broader resemblance in the commercial appearance. The balancing undertaken by the Court lay in reconciling two competing considerations: on one hand, the existence of minor artistic differences, and on the other, the practical realities of consumer perception in ordinary marketplace. By emphasizing on the broad and essential features of the wrappers, the Court manifested an early adoption of the standard of average consumer with imperfect recollection.

Over the years, Supreme Court's approach in *Parle Products* saw further refinements. In *S.M. Dyechem Ltd v. Cadbury (India) Ltd*, the Court shifted focus towards the role of defendant's conduct and a more nuanced conception of consumer perception while still relying on the principles of deceptive similarity<sup>90</sup> as evolved in *Parle Products*. The relevant paragraphs of the judgment have been extracted below: <sup>91</sup>

¶52. *In the present case, the defendant's goods contain the word "Cadbury" on their wrapper. As per the principle laid down in Fisons Ltd. v. E.J. Godwin [1976 RPC 653] the occurrence of the name "Cadbury" on the defendant's wrapper is a factor to be considered while deciding the question of passing off. Similarly in King & Co. Ltd. v. Gillard and Co. Ltd. [22 RPC 327 : (1905) 2 Ch 7 : 74 LJ Ch 421] and Cadbury Schweppes Pty. Ltd. v. Pub Squash Ltd. [1981 RPC 429 : (1981) 1 All ER 213 : (1981) 1 WLR 193] it was held that the presence of the defendant's name on his goods was an indication that there was no passing off, even if the trade-dress was similar.*

¶53. *The fact that the defendant's wrapper contains the word "Cadbury" above the word picnic is therefore a factor which is to be taken into account.*

¶ 54. *As to scope of a buyer being deceived, in a passing-off action, the following principles must be borne in mind. Lord Romer, L.J. has said in Payton & Co. v. Snelling, Lampard & Co. [(1900) 17 RPC 48 : 16 TLR 56 (CA)] that it is a misconception to refer to the confusion that can be created upon an ignorant customer. The kind of customer that the courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods,*

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<sup>90</sup> n (84)

<sup>91</sup> *ibid*

*those characteristics which distinguish his goods from other goods in the market so far as relates to general characteristics. If he does not know that, he is not a customer whose views can properly be regarded by the Court. (See the cases quoted in N.S. Thread & Co. v. Chadwick & Bros. [AIR 1948 Mad 481 : (1948) 1 MLJ 303] which was a passing-off action.) In Schweppes case [(1905) 22 RPC 601 (HL)] Lord Halsbury said, if a person is so careless that he does not look and does not treat the label fairly but takes the bottle without sufficient consideration and without reading what is written very plainly indeed up the face of the label, you cannot say he is deceived.*

*S.M. Dyechem* represents a refinement of the principles first articulated in *Parle Products*. The existence of the defendant's brand name ("Cadbury") on the product is emphasized in paragraphs 52–53 as a crucial element in determining the likelihood of confusion. The Court, by referencing English precedents, established that a distinct brand identity reduces the likelihood of passing off, even if the overall package deceptively matches the plaintiff's product. Compared to *Parle Products*, this offers a more calibrated perspective by balancing the general appearance with brand or textual cues that aid in consumer recognition. As in paragraph 54 (quoted above) of *S.M. Dyechem*, the courts must consider the viewpoint of a reasonably informed and conscious consumer rather than one who is completely uninformed or irresponsible. Lord Romer's theory makes a distinction between customers who are careless or inattentive and those who are aware of the unique features of the plaintiff's products. By specifically acknowledging that buyer's rationality and attention are crucial in assessing confusion, this logic improves on the "ordinary purchaser" criteria from *Parle Products*. The judgment highlights a dual focus: the overall visual impression of the product and the presence of clear identifying marks. This case postulates later developments in doctrinal concepts such as initial interest confusion, injurious association, and the "average consumer with imperfect recollection" standard that have become central to contemporary trade-dress litigation.

Though not as jurisprudentially prominent as the preceding decisions, the mediation plan contested in *Ajanta LLP v. Casio Keisanki Kabushiki Kaisha* illustrates a practical approach to trade-dress protection in commercial disputes, especially when mediation is used

to settle litigation.<sup>92</sup> The relevant paragraph of the mediation plan highlighted in the judgment has been referenced below:<sup>93</sup>

*(d) The third party undertakes to never use the packaging/trade-dress of the first party's scientific calculator fx-991es plus, annexed herewith as Annexure A or any other deceptively and confusing similar packaging, which is identical and/or deceptively and confusingly similar to the first party's packaging/trade-dress for its scientific calculators fx-991es plus;”*

The Supreme Court’s engagement with trade-dress in Ajanta LLP was limited to recording and enforcing mediated undertakings, without undertaking an independent adjudication on the merits of trade-dress protection. As a result, Ajanta LLP does not contribute substantively to the doctrinal development of trade-dress law, beyond evidencing the Court’s willingness to recognise and enforce trade-dress obligations through consensual dispute resolution.

The most recent trade-dress litigation before the Supreme Court - *Pernod Ricard India Pvt. Ltd. v. Karanveer Singh Chhabra & Ors.* represents a return to substantive judicial adjudication, by the Supreme Court with core principles governing trade-dress protection, including overall commercial impression, consumer perception, anti-dissection, distinctiveness, and the limits of protection for generic and laudatory elements <sup>94</sup> The court stated:

*“¶31.8. Trade-dress, encompassing the overall visual appearance of a product - including packaging, layout, colour schemes, and graphics - also enjoys protection. Indian courts have recognised that a deceptively similar trade-dress, even in the absence of a word mark, may mislead consumers and constitute passing off, particularly where visual cues trigger brand association and market confusion.”*

The Division Bench of J.B. Pardiwala and R. Mahadevan, JJ., opined that trade mark similarity must be assessed by considering the mark as a whole, and not by extracting a single component for comparison and mere presence of the common word ‘PRIDE’ which was a generic and laudatory term, did not render the competing marks deceptively similar in the

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<sup>92</sup> n (85)

<sup>93</sup> ibid

<sup>94</sup> n (86)

absence of an overall resemblance.<sup>95</sup> The Court reaffirmed the anti-dissection rule, holding that the marks must be assessed as a whole and not by isolating individual components. The Court also applied the anti-dissection rule in reference to a particular consumer base observing that:

*45. In the present case, the marks – ‘BLENDERS PRIDE’ and ‘LONDON PRIDE’ – are clearly not identical. Though the products are similar, the branding, packaging, and trade dress of each are materially distinct. The Commercial Court and High Court have rightly held that the term ‘PRIDE’ is publici juris, and commonly used in the liquor industry. The dominant components – ‘BLENDERS’, ‘IMPERIAL BLUE’, and ‘LONDON’ – are entirely different both visually and phonetically, producing distinct overall impressions.*

*46. The courts below also correctly observed that the products in question are premium and ultra-premium whiskies, targeted at a discerning consumer base. Such consumers are likely to exercise greater care in their purchase decisions. The distinct trade dress and packaging reduce any likelihood of confusion. The shared use of the laudatory word ‘PRIDE’, in isolation, cannot form the basis for injunctive relief.*

The engagement of the Supreme Court of India with trade-dress jurisprudence has been notably limited, confined to a total of four substantive decisions spanning several decades across distinct commercial contexts. Beginning with *Parle Products*, which established the foundational principles of deceptive similarity and consumer perception, the Supreme Court has progressively refined its approach. *S.M. Dyechem* introduced a more calibrated consumer standard and acknowledged the role of the brand identity in assessment of consumer confusion. While *Ajanta LLP* contributed sparingly to the jurisprudence, *Pernod Richard* marked a return to the substantive adjudication, reaffirming the anti-dissection rule and the relevance of average consumer with imperfect collection standard.

The sparse number of substantive Supreme Court decisions on trade-dress protection has resulted in High Courts exercising a disproportionate influence over the evolution of trade-dress jurisprudence in India and that too either through settlements, consent orders or mediation. As a result, aspects of the law on trade-dress such as the precise scope of protection, evidentiary

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<sup>95</sup> *ibid*

thresholds for consumer deception, and the contours of the anti-dissection rule remain unevenly articulated.

#### 4.2. THE DELHI HIGH COURT'S TRADE-DRESS JURISPRUDENCE

Over the past decade, the Delhi High Court has emerged as the principal forum for trade-dress protection litigation and has developed a distinctive body of trade-dress jurisprudence. There are four common threads of observation in the judgments of Delhi High Court: its persistent reliance on visual juxtaposition as the primary mode of analysis.

##### a) Early Articulation of Evidentiary Thresholds

An early illustration of the Delhi High Court's approach to trade-dress distinctiveness and passing-off can be seen in *Samsonite Corp. v. Vijay Sales*. In the *Samsonite Corpn.* the court observed:<sup>96</sup>

*¶135 The plaintiff must establish that a trade-dress or get up has become by use of distinctive of the plaintiff's goods. The term distinctive when used for the purpose of deciding the question of passing off must be taken as meaning factually distinctive and not mere assertion on the part of the plaintiff that the products of the plaintiff are inherently distinctive. When the plaintiffs are relying upon trade-dress or get up the plaintiffs must, prima facie, establish that the trade-dress or get up used by the plaintiffs had become associated exclusively with the products of the plaintiffs. The plaintiffs must also establish, prima facie, reputation and the plaintiffs must also, prima facie, show that the trade-dress of the defendants is likely to deceive or cause confusion.*

Applying the above-mentioned standard of distinctiveness, the Court held that Samsonite had failed to establish any secondary distinctive trade-dress. It noted that the colour, shape and other features referred to by Samsonite were quite common to the trade.<sup>97</sup> Samsonite had not established *prima facie* a proprietary right by the way of reputation and attendant goodwill in the trade-dress.<sup>98</sup> The Samsonite decision is doctrinally instructive in its insistence on a heightened evidentiary threshold for establishing distinctiveness in passing-off actions.

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<sup>96</sup> *Samsonite Corpn. v. Vijay Sales*, 1998 SCC OnLine Del 324

<sup>97</sup> *ibid* at 138

<sup>98</sup> *ibid* at 138

By foregrounding factual distinctiveness, the Court reinforced the core source-identification function of trade-dress and anchored its analysis in consumer perception.

b) Early convergence of trade-dress and copyright reasoning

The uncertainty regarding the relationship between trade-dress protection and copyright law emerges clearly in the cement packaging dispute in *JK Corp. Ltd. v. Pratibha Cement (P) Ltd.* JK Corporation sought to restrain Pratibha Cement or its partners, officers or servants from reproducing any of the artistic feature of JK Corp's trade-dress in any material form amounting to an infringement of the JK Corp's copyright.<sup>99</sup> The Court observed evidence in the form of affidavit that JK Corp. had been selling its cement in green HDPE bags which bears the trade mark Lakshmi cement.<sup>100</sup> This evidence was relied upon to establish a prima facie case of passing off as well as trademark infringement.<sup>101</sup> The decision granted a permanent injunction of the trade-mark in favour of JK Corp. and also held that there was a copyright infringement of the artistic features of the trade-dress.<sup>102</sup> This case constitutes an early illustration of intersection of trade-dress and copyright protection. The reasoning reflects a convergence of these regimes without a clearly articulated doctrinal basis, resulting in blurred analytical boundaries between design, copyright and trade-dress law. In treating the trade-dress as 'artistic work', the Court did not engage with the requirement of originality, the application of the work to an article or the implications of Section 15 of the Copyright Act, 1957 which mandates the exhaustion of copyright once a design is industrially applied beyond the prescribed threshold of 50 items. Further, the reliance on affidavit evidence foregrounded visual similarity while insufficiently engaging with questions of consumer association, market perception, and the potential generic nature of the colour green within the cement industry. Subsequent decisions reorient the inquiry toward colour and visual presentation as central determinants of trade-dress protection.

c) Colour Combinations as trade-dress identifiers

In *Colgate Palmolive Co. v. Anchor Health and Beauty Care (P) Ltd.*, Colgate sought an ad interim injunction against the use of trade-dress and colour combination of one-third red and two-third white in that order on the container of its product viz. tooth powder as by adopting

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<sup>99</sup> *JK Corp. Ltd. v. Pratibha Cement (P) Ltd.*, 2001 SCC OnLine Del 978

<sup>100</sup> *ibid*

<sup>101</sup> *ibid*

<sup>102</sup> *ibid*

the similar trade-dress particularly the colour combination of 'red and white'.<sup>103</sup> Colgate utilised the past history of Anchor to demonstrate the dishonest intention of the defendants in appropriating or adopting prominently similar trade-dress in terms of layout, get up and colour combination with obvious intention to encash upon the reputation and goodwill of the brand.<sup>104</sup> Colgate also highlighted that the red and white trade-dress for all these products which acquired the meaning as a trademark and therefore, has earned exclusive ownership of the said trade-dress because of its distinctiveness as well as use over a long period of time across wide geographical area.<sup>105</sup> Colgate contended that trade-dress involves the total image of a product and includes features such as size, shape and graphics and needs to be protected like trade mark and expounded on the doctrine of confusion arising from the deceptive similarities as to the trade-dress that may fail the unwary customer to distinguish between the rival goods.<sup>106</sup> The Court held that Colgate had succeeded prima facie in showing from the look of trade-dress of two articles that not only the unwary illiterate customers/servants of the household but semi-literate also cannot distinguish between Colgate and Anchor.<sup>107</sup> It was emphasised that, from the standpoint of the unwary and illiterate consumer unfamiliar with English, the relevant source-identifying feature was the visual trade-dress, especially the red-and-white colour scheme in its corresponding arrangement and proportion.<sup>108</sup> The court highlighted:

¶61. *In the case of passing off and for that purpose infringement of trademark which are already in existence, the second or for that purpose the subsequent comer has certain obligation to avoid unfair competition and become unjustly rich by encashing on the goodwill or reputation of the prior comer. They have to establish and bank upon on their own trade-dress or distinctive features so as to establish their own merit and reputation and attract the attention of the purchasing public and if there are no substantial dissimilarities of marks, colour combination, getup or layout on the container or packing or covering of the goods of the prior comer these are likely to create confusion in the minds of customers between his goods and the goods of the prior comer in the market as underlying and hidden intention of the second comer is to encash upon the successful rival.*

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<sup>103</sup> *Colgate Palmolive Co. v. Anchor Health and Beauty Care (P) Ltd.*, 2003 SCC OnLine Del 1005

<sup>104</sup> *ibid*

<sup>105</sup> *ibid*

<sup>106</sup> *ibid*

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

The Court further recognised that, in appropriate cases, even a single colour or colour combination may function as a source identifier and be capable of trade-mark protection, provided that it has acquired distinctiveness through secondary use.<sup>109</sup> On the facts, the Court enjoined Anchor by the way of ad-interim injunction<sup>110</sup> and restrained them from using the colour combination of red and white in that order on the container/packaging of its goods viz. the “Tooth Powder”.<sup>111</sup> The *Colgate* decision is significant for its explicit reliance on consumer perception and market association, rather than formal categorisation of the trade-dress, thereby reinforcing a consumer-centric approach to colour-based trade-dress protection.

#### d) Consumer Centric Analysis in FMCG markets

As the Delhi High Court’s trade-dress jurisprudence began to crystallise, *Cadbury India Ltd. v. Neeraj Food Products*<sup>112</sup> assumed particular significance in shaping strong consumer centric orientation. In *Cadbury India*, the Delhi High Court carefully examined claims of trademark infringement and passing off due to the defendant’s use of the mark “JAMES BOND” and packaging that looked similar to CADBURY GEMS. Cadbury is one of the seminal cases of the Delhi High Court dealing with trade-dress. While the case involved trademark infringement, and passing off claims, the Court treated the pillow-pack packaging as its own source identifier. The Court dismissed a breakdown of individual packaging elements. Instead, it highlighted the overall visual and conceptual impression created by the competing designs. A key point is the Court’s rationale reflects the position that trade-dress distinctiveness does not need to come from unique individual elements. Distinctiveness can result from how commonplace features are combined, arranged, and used over time. The Court also focused on consumer factors. By placing the likelihood of confusion within the context of inexpensive candy bought impulsively, mainly by children, it lowered the similarity standard needed to prove deception. The use of nearly identical color schemes, layouts, typography, and visual themes was enough to show misrepresentation, even with the defendant’s name on the packaging. This decision firmly connected trade-dress to passing off, linked to imperfect memory and real-world market conditions.

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<sup>109</sup> *ibid*

<sup>110</sup> An ad-interim injunction refers to a temporary injunction granted by a court at the initial stage of proceedings, often *ex parte*, to preserve the status quo until the application for an interim injunction is finally heard and decided.

<sup>111</sup> *ibid*

<sup>112</sup> *Cadbury India Ltd v Neeraj Food Products* 2007 SCC OnLine Del 841

The Court built on the Cadbury approach in *Frito-Lay India v Radesh Foods* by addressing the evidence in trade-dress claims more directly.<sup>113</sup> The case focused on the alleged imitation of snack packaging, with the defendant trying to underplay the deception caused through minor textual differences. The Court placed significant importance on the main visual features of the packaging. It ruled that consumer perception in fast-moving consumer goods markets relies more on colour blocks, layout, and recurring visual cues than on detailed text analysis. The Court also viewed the Local Commissioner's<sup>114</sup> report as evidence of deliberate imitation, suggesting that trade-dress infringement can be inferred from the patterns and closeness of copying, not just from direct similarities. Frito-Lay strengthens the idea that trade-dress works as a visual shortcut in consumer memory. The Court recognized that in markets where purchases are routine and attention is low, the law must protect the memory function of packaging. This decision thus provided a clearer way to prove trade-dress misappropriation.

While *Frito-Lay* situates trade-dress protection within low-involvement, fast-moving consumer markets, the Court's reasoning in *Ferrero SpA v Mahendra Dugar* adapts these principles to premium products where brand presentation serves a potent and characterising feature of the product. The Court identified Ferrero Rocher chocolates' gold foil wrapping, clear casing, and unique presentation as a cohesive trade-dress that had established strong source-identifying value.<sup>115</sup> The Court dismissed arguments that individual components, such as foil wrapping or transparent packaging, were standard. It insisted that trade-dress should be evaluated as an ensemble consistent with the anti-dissection principle<sup>116</sup> and the test of overall commercial impression.<sup>117</sup> A significant point is the Court's understanding of consumer sophistication. It ruled that consistent visual presentation strengthens brand association and increases the risk of confusion, rather than assuming that upscale consumers are immune to it. The decision clarifies that the scope of trade-dress protection does not diminish merely because the relevant consumers are relatively sophisticated. The operative inquiry remains whether the

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<sup>113</sup> *Frito-Lay India v Radesh Foods* 2009 SCC OnLine Del 714

<sup>114</sup> A Local Commissioner is a court-appointed officer, typically an advocate, tasked with assisting the court by conducting factual inspections, comparisons or evidence-gathering exercises. In trade-dress and passing-off disputes, Local Commissioners are frequently appointed to examine and compare competing products or packaging in the marketplace, document any similarities and report on patterns of alleged imitation. Reports submitted by the Local Commissioners are treated as corroborative evidence, particularly where deceptive similarity forms a central issue.

<sup>115</sup> *Ferrero SpA v Mahendra Dugar* 2013 SCC OnLine Del 2796

<sup>116</sup> The *anti-dissection principle* in trademark law requires that a mark or trade dress be considered as a whole rather than being dissected into its individual components for the purpose of comparison.

<sup>117</sup> The *test of overall commercial impression* evaluates whether the competing marks or trade dress, when viewed in their entirety, create a similar impression in the mind of an ordinary consumer.

overall presentation is likely to generate source association or confusion, even among the discerning consumers. *Ferrero* thus broadened trade-dress protection to include high-end products while maintaining its doctrinal rigor.

e) Trade-Dress in Digital Environments

The Courts have extended extend trade-dress protection beyond physical packaging to aspects involving digital systems. In *Himalaya Drug Co. v. Sumit*, an order for permanent injunction restraining the defendant, its principal officers, servants and agents and all others acting, for and on its website as and for that of the Himalaya Drug Company's by infringing the trade-dress rights in respect of the herbal database on the company's website.<sup>118</sup> The Court examined the evidence, particularly the section titled "Himalayas Herbs" consists of a database of over 209 herbs which essentially is a detailed monograph on each of the said herbs.<sup>119</sup> The Court noted that Himalaya Drug Company had expended considerable time, labour, skill and money in preparing this data base of Ayurvedic Herbs that find mention on its website and it took more than an year to curate the complete database.<sup>120</sup> The Court held that it was also clear that the arrangements of features on the website and in particular, the section relating to "Himalayas Herbs" including the layout, placement on details, get-up and the 'look and feel' cumulatively constitute a trade-dress.<sup>121</sup> The defendants attempt to pass off its herbal database and the appearance of the database similar to Himalaya website would cause consumer confusion.<sup>122</sup> It was held Himalaya is entitled to an ex-parte decree in terms of the four reliefs claimed: permanent injunction against the use of the database and an order for rendition of accounts of profits illegally earned by the defendant on account of the infringing activities.<sup>123</sup> Himalaya Drug Company was entitled to a decree of Rs. 7,94,227 by way of compensatory damages as well as a decree in the sum of Rs. 7,94,227 on account of punitive/exemplary damages, costs and the damages that were awarded at interest of @ 9% per annum from the date of the decree till date of payment.<sup>124</sup>

The case serves as a turning point since it considers 'website database' constitute 'trade-dress' and almost mirrors the doctrine of 'sweat of brow' in its rationale against the use of the

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<sup>118</sup> *Himalaya Drug Co. v. Sumit*, 2005 SCC OnLine Del 1443

<sup>119</sup> *ibid*

<sup>120</sup> *ibid*

<sup>121</sup> *ibid*

<sup>122</sup> *ibid*

<sup>123</sup> *ibid*

<sup>124</sup> *ibid*

website database. The application of the doctrine of ‘sweat of brow’ reflects an enmeshed understanding of the concepts of copyright and trademark law.

In another case, though framed as a domain-name issue, *Bharti Airtel Ltd v Airtel Asia* implicitly applies trade-dress reasoning to the digital world. The Court examined initial interest confusion and the likelihood of consumer association in a fast-paced online environment.<sup>125</sup> The Court’s rationale rested on the grounds of deceptive similarity, lack of a legitimate interest and bad faith registration and use aligns with trade-dress doctrine by considering the domain name a part of a larger source-identifying structure. By emphasizing consumer perception, imperfect memory, and associative confusion, the Court effectively applied trade-dress principles to a non-physical identifier. This decision shows the Court’s readiness to adjust trade-dress principles to new forms of commercial representation, even without labelling the claim as trade-dress. The Court highlighted that the adoption of domain name <www.airtelasia.com> by the defendants is completely malafide, dishonest and illegal. The domain name adopted by the defendants, by virtue of being so deceptively similar to that of the plaintiff, is bound to create confusion in the minds of public with respect to its origin and any average internet user would presume that the defendants are carrying on their business in association with the plaintiff.

f) Experiential Trade-Dress in Service Environments

Trade-dress protection has been further extended to spatial and experiential environments. *Ozone Spa* marks an important expansion of trade-dress doctrine into spatial and experiential designs.<sup>126</sup> The Court agreed that a fitness centre’s interior layout, which includes colour schemes, lighting, spatial arrangement, and overall atmosphere, could serve as a source identifier. Importantly, the Court did not consider store layout inherently protected. Protection depended on consistent use and clear consumer association. By linking protection to passing-off principles, the Court ensured that trade-dress claims about store layout stayed connected to misrepresentation and goodwill, rather than allowing monopolies over functional or practical designs. *Ozone Spa* recognizes that trade-dress can be experiential, especially in service industries where consumer association stems from repeated physical experiences instead of just packaging.

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<sup>125</sup> *Bharti Airtel Ltd v Airtel Asia* (2014) 9 HCC (Del) 237

<sup>126</sup> *Ozone Spa (P) Ltd v Pure Fitness* 2015 SCC OnLine Del 10768

### g) Trade-Dress in Luxury Jewellery & Footwear

In *Bulgari*, the Court considered trade-dress in the luxury jewellery sector, emphasizing on packaging, brand aesthetics, and presentation.<sup>127</sup> The Court reaffirmed that sophistication among high-end consumers does not eliminate the possibility of confusion or association. What sets Bulgari apart is its discussion of brand reputation as a legally recognized part of trade-dress. The Court acknowledged that in luxury markets, trade-dress signals heritage, exclusivity, and brand continuity. *Bulgari* serves as the conceptual bridge to *Crocs*. Having accepted in *Bulgari* that trade-dress protection may extend beyond word marks and logos to encompass the curated visual identity through which consumers perceive luxury goods, the Delhi High Court was prepared in *Crocs* to take the next analytical step: whether the physical design of the product itself could perform the same source-identifying function.

*CROCS decision* represents the most developed expression of trade-dress doctrine by the Delhi High Court so far.<sup>128</sup> The Court conducted a detailed analysis of functionality, distinguishing useful features from arbitrary and aesthetic choices in *Crocs* footwear design. By rejecting functionality as a blanket defence, the Court concluded that although individual features may have functional roles, the overall design had gained secondary meaning and served as a source identifier. This ruling reflects a careful balance between competition policy and proprietary rights, showing the Court's confidence in handling complex shape-based trade-dress claims.

The Delhi High Court's trade-dress jurisprudence does not exhibit a linear or uniform doctrinal trajectory. Rather, these decisions reflect case-specific engagements with trade-dress. In the cases reviewed, the Court has consistently focused on consumer perception and the general visual impression as the main factors in its analysis. It emphasizes factual distinctiveness and real market conditions over strict claims of exclusivity. In decisions such as *Samsonite*, the Court adopts a more restrained approach, requiring a higher evidentiary threshold and resisting the monopolisation of common features to the trade. By contrast, cases such as *Cadbury*, *Colgate*, *Frito-Lay* and *Ferrero* demonstrate a pronounced consumer-centric orientation, particularly in contexts involving low-attention purchasing, habitual consumption or strong visual branding. In these settings, the Courts lowers the confusion threshold in

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<sup>127</sup> *Bulgari SpA v Notandas GEMS (P) Ltd* 2022 SCC OnLine Del 591

<sup>128</sup> *CROCS Inc USA v Bata India Ltd* 2025 SCC OnLine Del 4626

scenarios involving low attention or habitual buying, acknowledging that distinctiveness can come from how common elements are arranged together.

However, the Court's rulings reveal requirements of some conceptual clarity. The frequent mixing of trade-dress with copyright, seen in *JK Corp. and Himalaya Drug*, points to lingering uncertainty about the boundaries between different forms of intellectual property. Additionally, the Court has expanded trade-dress reasoning to cover digital interfaces, databases, store layouts, and product shapes. This expansion has unfolded in the absence of a clearly articulated framework and continues to rest on uneven invocations of goodwill, representation, and consumer association. As a result, the jurisprudence evolved by the Delhi High Court reveals both the expanding reach of trade-dress protection and the doctrinal fragility of a regime fashioned largely through judicial innovation.

#### 4.2. THE BOMBAY HIGH COURT'S TRADEMARK JURISPRUDENCE

An analysis of the Bombay High Court judgments pertaining to trade-dress litigation reveals a different judicial sensibility in the treatment of trade-dress claims. The Court's cautious approach to trade-dress protection is evident in *L'Oréal India (P) Ltd. v. Henkel Marketing India Ltd.*, where the Court drew a clear distinction between protectable trade-dress and generic visual features prevalent within an industry.

##### a) Generic Industry Features and limits of trade-dress protection

In *L'Oréal India (P) Ltd. v. Henkel Marketing India Ltd.*, the case involved claims of deceptive similarity in the packaging of competing hair care products.<sup>129</sup> The Court recognized that trade-dress could be protected under passing-off law but stated that no proprietary claim could exist over generic visual features commonly found in the industry. The Court emphasized a context-sensitive evaluation, stating that similarity should be judged based on industry practices and consumer expectations. The Bombay High Court insisted on solid evidence of potential consumer confusion, showing its reluctance to equate visual similarity with misrepresentation. The Court's resistance to extending trade-dress protection to product shapes without rigorous proof of secondary meaning is particularly visible in *Gorbatschow Wodka KG v. John Distilleries Ltd.*

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<sup>129</sup> *L'Oréal India (P) Ltd v Henkel Marketing India Ltd* 2005 SCC OnLine Bom 969

#### b) Product Shape and Secondary Meaning

In *Gorbatschow Wodka KG*, the Plaintiff (*Gorbatschow Wodka KG*) sought exclusive rights over the unique shape of its vodka bottle, claiming the shape identified the source.<sup>130</sup> While the Court accepted that product shape could be trade-dress, it required strict evidence of acquired distinctiveness and non-functionality. The Court would not assume secondary meaning based on uniqueness alone and demanded market evidence showing consumer association. It also warned against using trade-dress claims to bypass the limited protections under design or patent law, reinforcing its opposition to permanent monopolization of product shapes.

#### c) Colour Combinations and Trade-Dress

In *Sky Enterprise (P) Ltd. v. Abaad Masala & Co.*, the Court had an opportunity to look at allegations of trade-dress infringement from competing spice packaging.<sup>131</sup> While it acknowledged that color schemes and layouts can contribute to trade-dress, it decided that simply using similar colors—especially those culturally linked to the product category—was not enough to establish passing off. The Court differentiated between consumer association and actionable confusion, noting that familiarity with common market aesthetics reduces the chance of deception. This ruling stressed the need for clear evidence of misrepresentation instead of just speculation about confusion.

#### d) Trade-Dress in Digital Environments

In *Trent Ltd. v. Zudiofranchise.net*, a case about domain names, the Court cautiously applied trade-dress reasoning to the online environment.<sup>132</sup> Rather than treating the website's visual resemblance as independently actionable, the Court located infringement in the defendants' deliberate appropriation of the plaintiff's mark, artistic work, corporate identity, and franchise imagery in a manner calculated to mislead consumers at the stage of initial interest. This refines the emerging judicial position by indicating that, even in virtual marketplaces, trade-dress remains legally cognizable only when visual similarity is tied to the

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<sup>130</sup> *Gorbatschow Wodka KG v John Distilleries Ltd* 2011 SCC OnLine Bom 557

<sup>131</sup> *Sky Enterprise (P) Ltd v Abaad Masala & Co* 2020 SCC OnLine Bom 750

<sup>132</sup> *Trent Ltd v Zudiofranchise.net* 2023 SCC OnLine Bom 2835

classic passing-off concerns of deceptive intent, consumer confusion, and commercial misappropriation.

A key aspect of these decisions is the Bombay High Court's hesitation to assume secondary meaning or consumer confusion just based on visual similarity. Instead, the Court consistently requires strong market evidence showing a unique consumer connection and deceptive intent. This approach keeps trade-dress protection firmly within traditional passing-off law and prevents its misuse as a replacement for limited design or patent rights. The Court supports competitive freedom and market access while only recognizing goodwill protection when the plaintiff meets a high burden of proof.

#### 4.3. THE MADRAS HIGH COURT'S TRADEMARK JURISPRUDENCE

In terms of trade-dress protection, the Delhi High Court generally focus on consumer perceptions and impressions, and the Bombay High Court base its decisions on competition-based approach, and as we will see in this section, the Madras High Court's treatment of trade-dress shows a systematic method grounded in legal principles. The Court consistently avoids viewing trade-dress as a separate category of protection. Instead, it places trade-dress firmly within the established framework of trademark infringement and passing-off law, stressing the importance of legal consistency, relevant limits, and specific public interest factors.

##### a) Packaging Similarity and Evidentiary Thresholds

In *Lion Dates Impex Private Ltd. v. Murugan & Co.*, the Madras High Court looked at claims of misleading similarity due to competing packaging for dates and dried fruit.<sup>133</sup> The Court accepted that packaging and overall appearance could identify sources, but it would not assume protectability just from similarities in color or layout. The Court pointed out that trade-dress protection does not extend to descriptive or typical elements common to a trade. It required clear proof that the overall presentation had developed a distinctive link to the proprietor of the trade-dress. This ruling emphasizes the need for evidence of exclusivity through consumer connections, rather than relying on visual similarity or prior use.

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<sup>133</sup> *Lion Dates Impex (P) Ltd v Murugan & Co* 2012 SCC OnLine Mad 5366

## b) Functionality and Product Design

The Court's focus on legal boundaries is most apparent in *Techno Plastic Industries v. Dart Industries*, where the plaintiff claimed trade-dress rights over the shape of food storage containers.<sup>134</sup> The Madras High Court viewed functionality as a key concern, ruling that features determined by utility or technical needs do not qualify for trade-dress protection. Instead of weighing functionality against overall impressions like some other courts, the Madras High Court excluded functional features from the start. This decision indicates a judicial concern about trade-dress being misused to bypass the limited protections offered by design and patent law, reinforcing competition-friendly limits.

## c) Trends in Pharmaceutical Industry

*TTK Healthcare Ltd. v. S.R. Bio Future Labs* represents a scenario where the Court examined trade-dress claims in the pharmaceutical field.<sup>135</sup> Recognizing the significant public interest tied to healthcare products, the Court set a lower threshold for actionable confusion. It acknowledged that similarities in colours, layouts, or packaging could cause serious consumer harm. While still tied to passing-off principles, the Court adjusted its analysis based on the risks of mistaken associations in medicine. This ruling shows that the Madras High Court's legal discipline is sensitive to context and allows public interest to influence trade-dress standards.

## d) Trade-Dress in Digital Environments

The Madras High Court's cautious approach to non-traditional trade-dress is evident in *PhonePe (P) Ltd. v. Digipe Fintech (P) Ltd.*, which involved branding elements in digital payment apps.<sup>136</sup> Although it was framed as a trademark infringement case, the Court's reasoning aligned closely with trade-dress principles, emphasizing the overall interface, colour schemes, and consumer connections in app environments. However, the Court stopped short of recognizing digital interfaces as automatically protectable trade-dress. It insisted on strong evidence of misrepresentation and confusion, showing reluctance to extend trade-dress protection to new commercial forms without solid legal foundations.

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<sup>134</sup> *Techno Plastic Industries v Dart Industries* 2017 SCC OnLine Mad 1447

<sup>135</sup> *TTK Healthcare Ltd v S R Bio Future Labs* 2017 SCC OnLine Mad 37804

<sup>136</sup> *PhonePe (P) Ltd v Digipe Fintech (P) Ltd* 2023 SCC OnLine Mad 5626

#### e) Trade-Dress in FMCG markets

The two decisions in *Britannia Industries Ltd. v. ITC Ltd.* (2023 and 2025) provide a refined view of the Madras High Court's stance on trade-dress in crowded FMCG markets.<sup>137</sup> The Court acknowledged that even common elements like colours, layouts, and packaging can gain source-identifying meaning through consistent use. At the same time, it carefully differentiated between legitimate competitive similarities and deceptive imitation, refusing to grant exclusivity over common trade elements without strong evidence of consumer association. These rulings reflect the Court's attempts to balance practical market realities with legal caution, steering clear of both under-protection and overreach.

#### 4.4. THE CALCUTTA HIGH COURT'S TRADEMARK JURISPRUDENCE

The Calcutta High Court's handling of trade-dress centres on commercial morality, unfair competition, and business reputation. The Court has seldom treated trade-dress as a standalone category. Instead, it examines trade-dress claims within a broader context of dishonest trading practices, misappropriation of goodwill, and unfair advantage.

#### a) Trade-Dress in FMCG Markets

In *Heinz Italia S.R.L. & Heinz India Pvt. Ltd. v. Dabur India Ltd.*, the Court looked at claims of deceptive similarity in food product packaging.<sup>138</sup> Rather than comparing individual visual elements in detail, the Court focused on whether the overall presentation of the defendant aimed to benefit from the reputation of a well-known brand. Trade-dress was seen as part of corporate identity and market reputation. The Court stressed that imitation creating an association with an established brand leads to unfair competition. The analysis prioritized commercial honesty over technical analysis, showing the Court's preference for a reputation-based approach. In *Danone Asia Pacific Holdings (P) Ltd. v. Syed Jawed Mohsin*<sup>139</sup>, the anti-dissection rule was reaffirmed as the Court stressed that the trade-dress must be seen in its entirety and not in isolation. The Court noted that "*on a comparison of the two products, though the word "Protifix" is prominently displayed on the packaging, the colour combination and the overall impression would tend to confuse and deceive consumers.*"

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<sup>137</sup> *Britannia Industries Ltd v ITC Ltd* 2023 SCC OnLine Mad 7754

<sup>138</sup> *Heinz Italia SRL & Heinz India (P) Ltd v Dabur India Ltd, S K Distributors & Blue Cross Chemist & Druggist* 2007 SCC OnLine Cal 665

<sup>139</sup> *Danone Asia Pacific Holdings (P) Ltd. v. Syed Jawed Mohsin*, 2025 SCC OnLine Cal 8070

## b) Trade-Dress in Battery Products

A similar perspective is seen in *Eveready Industries India Ltd. v. Euro-Solo Energy Systems Ltd.*, involving competing battery products.<sup>140</sup> The Court viewed trade-dress as a visual sign of reliability and business credibility in a crowded market. It ruled that intentional imitation of packaging undermines consumer trust and distorts competition, especially when the plaintiff has strong market recognition. The Court focused less on distinctive elements and more on patterns of behaviour that suggest dishonest appropriation. In *Amara Raja Energy & Mobility Ltd. v. Exide Industries Ltd.*,<sup>141</sup> one of the novel arguments highlighted was the adoption of various trade-dresses adopted by Exide in differing colour combinations for the battery products. However, Exide was able to establish the prior use of colour red as a part of the trade-dress. It must be highlighted that the case referenced the evidence of a campaign run by Amara Raja Energy where in it had claimed that ‘green was better than red with the general public reacting and identifying the colour red with the Exide while the colour green with the Amar Raja Energy.’ The court applied the visual test and affirmed that the eye remains the primary test for the degree of resemblance in a passing off action. Having physically examined the competing boxes and batteries placed before it, the court found the shade of red used by Amara in the Elito packaging to be the exact same shade as Exide’s, disagreeing with Amara Raja’s submission to the contrary. The Court further highlighted that the logo, the style and the category of goods, the colour combination of all go to indicate that the relevant section of the public dealing in such category of goods i.e. healthcare products are likely to be confused and deceived.

## c) Trade-Dress in Tableware

In *La Opala R.G. Ltd. v. Cello Plast*, the Calcutta High Court dealt with claims about product shape and aesthetic design in tableware.<sup>142</sup> The Court recognized that while functionality must be considered, non-functional aesthetic aspects could collectively qualify as protectable trade-dress. The analysis considered functional needs against the risk of unfair advantage, showing a practical approach to protecting visual identity when imitation seemed intended to exploit established goodwill. However, the lack of a clear functionality test highlights the Court’s tendency to weave doctrinal issues into broader fairness discussions.

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<sup>140</sup> *Eveready Industries India Ltd v Euro-Solo Energy Systems Ltd* 2009 SCC OnLine Cal 1298

<sup>141</sup> *Amara Raja Energy & Mobility Ltd. v. Exide Industries Ltd.*, 2026 SCC OnLine Cal 3202

<sup>142</sup> *La Opala RG Ltd v Cello Plast* 2018 SCC OnLine Cal 16872

The Calcutta High Court's jurisprudence on trade-dress law is characterized by a unique orientation that places trade-dress within the larger framework of unfair competition and commercial ethics. Instead of following structured tests for distinctiveness or functionality, the Court often assesses trade-dress claims through the lens of reputational misappropriation and dishonest market practices.

## 5. NAVIGATING THE PRINCIPLES USED BY INDIAN COURTS

As we have seen above, Indian courts have struggled to establish a consistent test for handling trade-dress disputes. Instead, trade-dress protection has developed through the gradual application of several overlapping principles taken from trademark and passing-off law. These principles often serve as guiding tools rather than strict rules, thereby showing inconsistent application. The most commonly used principles include: (i) overall comparison, (ii) the anti-dissection rule, (iii) initial interest confusion, (iv) injurious association, and (v) the standard of the average consumer with imperfect recollection. Together, these principles form the framework that courts use to evaluate visual similarity, consumer deception, and the unauthorized use of goodwill in trade-dress claims.

### 5.1. OVERALL COMPARISON

The principle of overall comparison is central to Indian trade-dress law. Courts consistently stress that trade-dress should be evaluated as a whole instead of by examining individual elements separately. This approach stems from early passing-off cases, particularly articulated by the Supreme Court in *Parle Products (P) Ltd. v. J.P. and Co.*, where the Court stated that minor differences do not matter if the overall visual impression could mislead. High Courts have consistently used this principle to dismiss detailed analysis. In *Cadbury India Ltd. v. Neeraj Food Products*, the Delhi High Court refused to dissect the pillow-pack packaging of CADBURY GEMS into parts like color, font, or images. Instead, it looked at whether the overall arrangement of common features had gained distinctiveness and was likely to create consumer connection. The Court acknowledged that distinctiveness can arise from combination and consistency, even when no single feature is truly unique. Similarly, in *Ferrero SPA v. Mahendra Dugar*, the Court rejected the defendant's attempt to view gold foil wrapping, transparent casing, and spherical chocolates as individually generic. It determined that trade-dress operates at the level of overall perception, especially when consistent visual presentation has become linked to the brand. This focus on overall comparison allows courts to protect a

product's "look and feel" without granting exclusivity over its separate parts. However, this principle has also led to some overreach. In cases such as *Himalaya Drug Co. v. Sumit*, the Delhi High Court applied overall comparison to digital platforms and website databases, treating layout and presentation as trade-dress without adequately considering functional restrictions or copyright issues. The Bombay High Court in *Gorbatschow Wodka KG* also emphasized the importance of assessing the overall commercial impression of the competing bottle designs. While acknowledging the similarities, the Court insisted that overall comparison must be accompanied by clear evidence of distinctiveness and consumer association. The Calcutta High Court adopted a broader reputational perspective in *Heinz Italia S.R.L. v Dabur India Ltd.*, where the Court examined the overall presentation of food packaging primarily through the lens of commercial reputation and unfair competition rather than through a strict element-by-element comparison. The flexibility of the overall comparison test, while conceptually reasonable, has contributed to uncertainty when used without clear limits.

## 5.2.ANTI-DISSECTION RULE

The anti-dissection rule closely connects to overall comparison and warns courts against isolating individual parts of a composite mark or trade-dress for independent comparison. This rule reflects how consumers perceive products: they do not analyze items feature by feature; they respond to their overall visual identity. The Supreme Court clarified this rule in *Pernod Ricard India (P) Ltd. v. Karanveer Singh Chhabra*, where the Court dismissed the appellants' attempt to separate the word "PRIDE" from composite marks like BLENDERS PRIDE for comparison with LONDON PRIDE. The Court ruled that similarity must be assessed by viewing the mark and its trade-dress as a complete unit and that isolating a common or generic element was legally inappropriate. High Courts have followed this reasoning in trade-dress cases as well. In *Frito-Lay India v. Radesh Foods*, the Delhi High Court chose not to focus on minor textual differences or brand names when the main visual features such as colour blocks, layout, and graphical hierarchy, were very similar. The Court viewed the defendant's focus on small differences as an unacceptable dissection of the overall trade-dress. At the same time, the anti-dissection rule has not been consistently enforced. In *S.M. Dychem Ltd. v. Cadbury (India) Ltd.*, the Supreme Court seemed to relax the rule by considering the defendant's brand name a substantial factor reducing confusion. This decision shows a tension in Indian law: while courts support anti-dissection in theory, they sometimes

allow selective focus on textual or branding elements when it aligns with their views about consumer awareness.

### 5.3. INITIAL INTEREST CONFUSION

Initial interest confusion refers to a situation where a consumer is initially attracted to a product because of its similarity, even if confusion is resolved before purchase. Indian courts have not systematically defined this doctrine, but it has been implicitly applied in both physical and digital trade-dress cases. In *Bharti Airtel Ltd. v. Airtel Asia*, despite being framed as a domain-name dispute, the Delhi High Court's reasoning aligns closely with the initial interest confusion doctrine. The Court noted that even a temporary association during an online search or initial contact could unfairly exploit the plaintiff's goodwill. The focus was not on complete confusion but on the defendant's ability to draw consumer interest through similarity. The Bombay High Court in *Trent Ltd. v. Zudiofranchise.net* recognized initial interest confusion but imposed stricter limits, insisting that such confusion must be linked to deceptive intent and the misappropriation of goodwill. This approach reflects the Bombay High Court's general reluctance to extend trade-dress protection based on fleeting or speculative confusion. In cases such as *Cadbury and Frito-Lay*, initial interest confusion operates implicitly. The courts acknowledged that in low-involvement purchases, consumers often rely on quick visual cues, and initial associations can be enough to affect purchasing decisions. Therefore, Indian courts frequently protect trade-dress as a shortcut for memory, even if a post-purchase examination might reveal differences.

### 5.4. INJURIOUS ASSOCIATION

The principle of injurious association broadens trade-dress protection beyond simple confusion to cover instances where similarity creates an unauthorized association that harms the plaintiff's goodwill. This principle is particularly relevant in luxury markets and those sensitive to reputation. In *Bulgari SPA*, the Delhi High Court stated that in luxury markets, trade-dress signals heritage, exclusivity, and brand identity. The Court recognized that even sophisticated consumers might make associative links based on visual similarity, and that harm could stem not from mistaken purchases but from a dilution of brand identity. The Calcutta High Court has consistently relied on injurious association as an important basis for protecting trade-dress. In *Heinz Italia v. Dabur India and Eveready Industries v. Euro-Solo*, the Court focused on whether the defendant's actions unfairly claimed the plaintiff's reputation rather

than relying only on consumer confusion trade-dress was seen as part of a larger reputational context, and imitation was deemed unethical. In *TTK Healthcare Ltd v S.R. Bio Future Labs*, the Madras High Court similarly recognized that similarity in pharmaceutical packaging could create harmful associations affecting consumer safety, thereby expanding the analysis beyond traditional confusion tests. While injurious association strengthens protections for well-known brands, it also runs the risk of blurring legal boundaries. By prioritizing reputation over consumer deception, courts sometimes overlook established standards of distinctiveness and functionality, leading to legal confusion.

#### 5.5.AVERAGE CONSUMER WITH IMPERFECT RECOLLECTION

The standard of the “average consumer with imperfect recollection” is a key concept in Indian trade-dress law. It recognizes that consumers do not remember products exactly and are influenced by general impressions instead of specific details. This standard was originally established in *Parle Products* and developed in later decisions. In *Colgate Palmolive Co. v. Anchor Health and Beauty Care (P) Ltd.*, the Delhi High Court applied the standard broadly, stating that illiterate and semi-literate consumers primarily rely on colour combinations and overall appearance. The Court downplayed brand names and textual differences, emphasizing visual perception. In contrast, in *S.M. Dyechem*, the Supreme Court limited the scope of this standard by saying that careless or inattentive consumers should be excluded and that focus should be on reasonably informed buyers. In *Marico Ltd v Agro Tech Foods Ltd*, the Delhi High Court reiterated that consumers in fast-moving consumer goods markets often rely on quick visual cues rather than detailed textual comparison when identifying products. This difference highlights the flexibility of the “average consumer” concept, which courts adjust based on product type, price, and perceived sophistication. Recent cases such as *Ferrero and CROCS* show that consumer sophistication does not eliminate imperfect recollection and the courts have acknowledged that even discerning consumers might rely on consistent visual clues, particularly when trade-dress has strong secondary meaning.

These principles indicate that Indian trade-dress decisions use a flexible but disjointed set of legal tools. Courts navigate the balance between protecting consumer perception, maintaining goodwill, and allowing competitive freedom, often without clearly resolving these goals. Principles such as overall comparison and anti-dissection help courts assess consumer behaviour, but their inconsistent application especially alongside injurious association and initial interest confusion creates legal uncertainty. The lack of a clear trade-dress framework

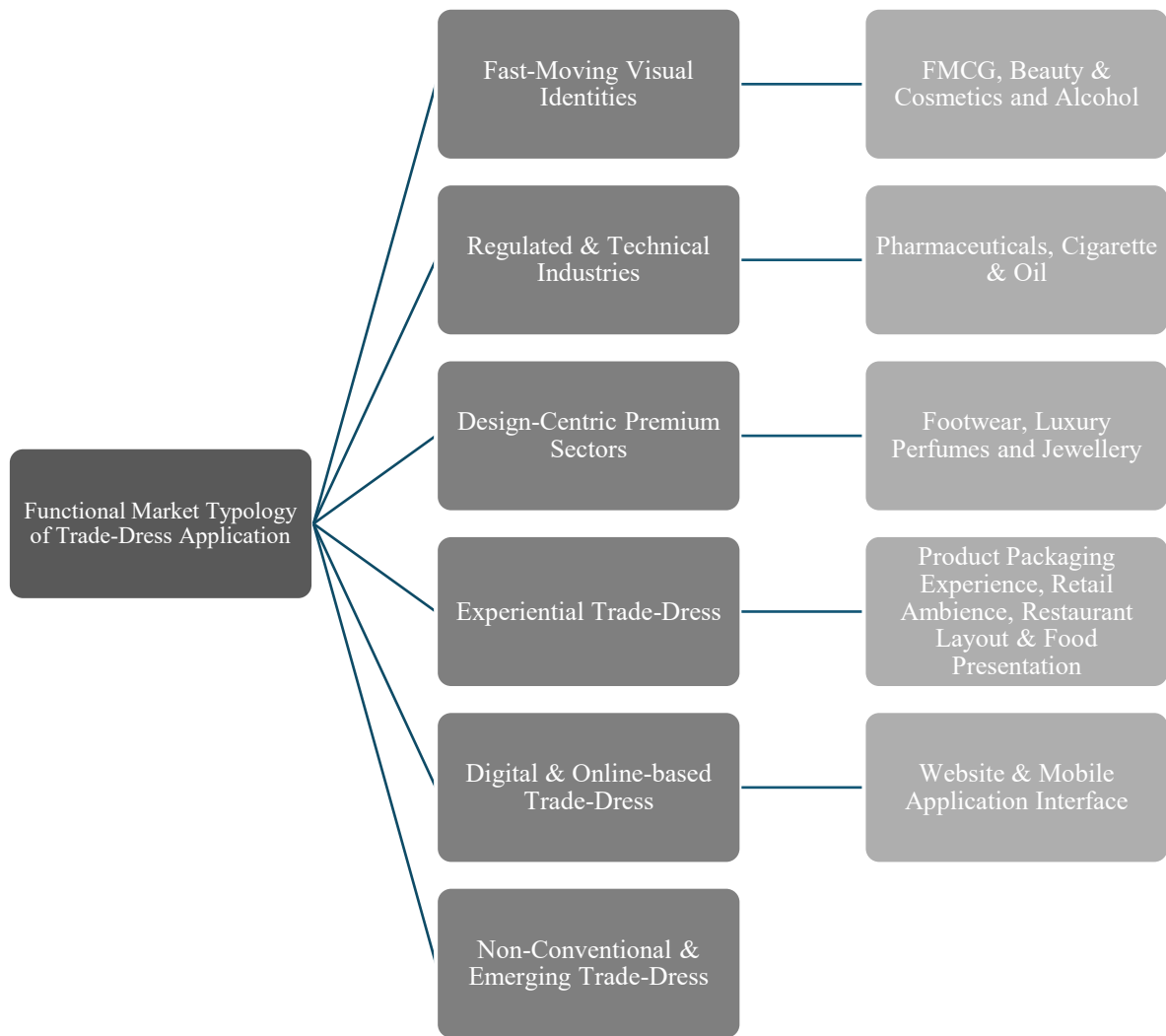
means that outcomes vary significantly from case to case depending on markedly different commercial environments. While this flexibility has allowed them to adapt to changing markets, it has also highlighted the need for clearer legal guidelines to avoid overlap, overreach, and unpredictability in trade-dress protection.

Overall, this suggests that the existing jurisprudence cannot be fully elucidated through principle-based analysis alone and requires a framework capable of situating judicial reasoning within the commercial contexts. It is this need for contextual organization that motivates the functional market typology proposed in the following section.

## **6. PROPOSAL OF A FUNCTIONAL MARKET TYPOLOGY**

Taken together, the jurisprudence of the Delhi, Bombay, Madras and Calcutta High Courts reveals that the trade-dress protection in India has evolved through divergent judicial philosophies rather than a single coherent doctrinal framework. While this plurality allows the law to respond flexibly to evolving market practices, it also underscores the absence of an underlining analytical framework governing trade-dress protection in India.

To address this doctrinal fragmentation, the present study proposes a functional market typology of trade-dress protection that situates judicial reasoning within the commercial contexts in which trade-dress operates in order to better understand the trade-dress law in India. Rather than treating trade-dress as a uniform legal category, this model recognises that the source identifying function of trade-dress is mediated by sector specific factors such as consumer behaviour, regulatory structures, aesthetic investment and the speed of purchasing decisions. This typology classifies trade-dress applications into six functional market categories: fast-moving visual packaging identities, regulated and technical industries, design-centric premium sectors, experiential trade-dress, digital and inter-face based trade-dress, and non-conventional or emerging forms of trade-dress. By mapping trade-dress disputes onto these commercial environments, the proposed typology provides a structured analytical framework for evaluating how courts interpret distinctiveness, confusion, functionality, and unfair competition across different sectors of the marketplace. The following diagram (Figure 1) provides an illustrative mapping of the identified categories and examples of representative products falling within them. These examples are indicative rather than exhaustive and are intended to clarify the functional logic underlying the classification.



*Figure 1: Functional Market Typology of Trade-Dress Applications Demonstrating Sector-Specific Commercial Contexts and Illustrative Product Categories*

This classification of trade-dress into market categories does not function as a rigid industrial taxonomy; rather, it reflects the differential commercial reasoning that shape the functioning of visual identity of a product within the marketplace. Products may traverse across these categories due to the porous boundaries between them. At this stage, the proposed functional typology should be understood primarily as a theoretical framework intended to organize and interpret the evolving jurisprudence of trade-dress protection in India. The model does not claim to provide an exhaustive or definitive categorization of all possible commercial manifestations of trade-dress. Rather, it seeks to offer a preliminary analytical framework that highlights the relationship between sector-specific market dynamics and judicial reasoning in trade-dress disputes. As commercial contexts continue evolving, the contours of trade-dress protection are likely to expand in new and unforeseen directions. The proposed typology serves

as an initial conceptual map that may be refined, expanded and empirically tested through further doctrinal and sector-specific research. Further scholarship may build upon this framework to examine how different industries shape evidentiary thresholds, consumer perception standards, and competitive considerations that inform trade-dress jurisprudence in the Indian context.

Beyond the typological refinement, the broader project of developing and refining a coherent trade-dress jurisprudence in India necessitates a critical re-engagement with the Trade Marks Act, 1999 itself. While Section 2 (zb) of the Trade Marks Act, 1999 provides for an expansive definition of ‘trademark’, the legislation remains conspicuously silent on trade dress as a distinct, cognizable category of intellectual property. A legislative intervention whether through a targeted amendment or supplementary rules under the Trade Marks Act, 1999 that formally codifies the trade-dress protection, establishes evidentiary standards for distinctiveness, and articulates the boundaries of functionality would lend much-needed doctrinal coherence to this evolving area of law, ensuring that judicial reasoning develops on a more principled and predictable statutory basis.

## **7. CONCLUSION**

The development of trade-dress protection in India reflects the broader evolution of trademark law in a rapidly changing marketplace. The Indian courts have demonstrated an increasing willingness to recognise that trade-dress can function as a source-identifier. At the same time, the absence of clearly articulated principles has produced a jurisprudence that is adaptive yet uneven. As trade-dress claims continue to expand into digital, experiential and technologically mediated environments, a more structured articulation of the law will be essential to ensure that trade-dress protection in India develops coherently within the broader framework of trademark law while maintaining a careful balance between goodwill protection and competitive freedom.