
AESTHETIC FUNCTIONALITY AND FASHION LAW: AN INQUIRY INTO THE LIMITS OF TRADEMARK PROTECTION IN THE FASHION INDUSTRY

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ABSTRACT

Fashion is inherently aesthetic, with designers relying on visual elements to distinguish their creations and build brand equity. It has given rise to complex debates over the possible implications of fashion designs. A key feature of these discussions has been the so-called doctrine of aesthetic functionality. This rule asks the degree to which trademarks can guard design features that perform a decorative function instead of indicating source. Based on aesthetic functionality, this research critically analyses the applicability and constraints of trademark protection in the Indian fashion business. In this study, we will review the manner in which the Indian Courts and IP Authorities have used and applied trademark law on patterns, shapes, colours and embellishments that are purely aesthetically pleasing and yet could potentially deliver a commercial value by creating an element of choice in consumer preference. Based on the comparative analysis from countries like the US and the EU, the study will evaluate the extent to which the current legislation in India provides an adequate balance to the interests of designers and consumers and protects against the monopolisation of aesthetic functionality characteristics. Finally, the proposed research will make a small contribution to the broader discussion on fashion law in India by proposing a more refined sense of aesthetic functionality that would sit comfortably with the best global practices and with the emerging fashion landscape in India.

Keywords: Aesthetic, Functionality, Trademark, Fashion law, Non-Traditional Marks, Competition

Introduction

Fashion operates in a unique cultural and economic space. Unlike most industries where utility governs consumer preference, fashion's reliance on visual appeal, symbolism, and aesthetics makes this topic highly relevant to industry professionals and scholars alike, emphasizing its importance. This aesthetic-centric nature makes fashion particularly vulnerable to overreach by intellectual property regimes, especially trademark law.

Trademarks traditionally function as indicators of source, ensuring that consumers can distinguish one trader's goods from another's. In the fashion industry however, trademarks often extend far beyond conventional word marks or logos. They often extend to patterns (such as Burberry checks), single colours (such as Louboutin red soles), textures, store layouts, and even the overall "get-up" of products. The incentive for brands to pursue these protections is clear: unlike copyright and design protection, trademarks can last indefinitely, subject to continued use. Yet this very advantage creates tension. Should brands be able to monopolise visual or aesthetic features that consumers value not because they signal source, but because they are inherently attractive?

This potential for perpetual exclusivity gives rise to a fundamental tension. Should trademark law allow fashion brands to monopolise aesthetic features that consumers value primarily for their beauty rather than their ability to signal origin? If such monopolisation is permitted, it risks foreclosing competition, restricting creative freedom, and transforming trademark law into a de facto design protection regime without temporal limits.

This is where the doctrine of aesthetic functionality enters the debate. The doctrine denies trademark protection for features whose value lies in their aesthetic appeal to consumers, rather than their source-identifying capacity. The rationale is simple: if aesthetic features could be monopolised, competitors would be unfairly excluded from offering designs consumers find desirable.

The United States has developed aesthetic functionality as a judicial doctrine, while the European Union (EU) has embedded similar concerns in statutory exclusions. India, by contrast, has yet to articulate a clear position, though the Trade Marks Act, 1999, contains language that could form the basis of such a doctrine. Given India's growing fashion market, this silence has practical consequences for global luxury brands and domestic designers.

This paper critically compares global perspectives on the doctrine of aesthetic functionality, focusing on Indian statutory and judicial approaches to inform reforms and align with best practices.

Understanding the Doctrine of Aesthetic Functionality

The functionality of a trademark law traditionally refers to utilitarian functionality, or in other words features of a product that are essential to its use or have some influence on its cost or quality. Aesthetic functionality on the other hand deals with features whose ornamental value will give them a competitive advantage. The main principle shared by both notions is that it is centered on the principle of competition: protection of trademarks should not be implemented to curtail honest competition by assigning a monopoly on aspects according to which other companies need to develop their own products.

The aesthetic functionality is based on the assumption that some element of the design is so appealing to the consumers that, given exclusive rights, they will place a large non-reputational cost to their rivals. When that happens, the feature is claimed to play a “function role in altering the way consumers make decisions without considering the source.

This doctrine has raised a fair share of controversy mostly due to its seemingly incongruity with the acknowledgement of non-traditional marks within the trademark law. Opponents believe that aesthetic functionality undermines the protective measures that accords marks that have gained uniqueness thanks to the consumer association mechanism, whereas others believe that its failure to take aesthetic functionality into account is likely to make trademark law a total monopoly of visual culture. The pressure mentioned above is especially relevant to the sphere of fashion in which the line between the aesthetic value and the brand image is inherently blurred.

The Doctrine of Aesthetic Functionality: Global Perspectives

United States

The origins of aesthetic functionality in the U.S. can be traced to *Pagliari v. Wallace China Co.*, where the Ninth Circuit held that floral patterns on china were functional because they contributed to the product’s commercial success.¹ This expansive definition risked excluding a

¹ *Pagliari v. Wallace China Co.*, 198 F.2d 339, 343 (9th Cir. 1952).

wide range of attractive features from protection. Later cases refined the test, distinguishing between source-identifying features and features competitors genuinely need. In *Qualitex Co. v. Jacobson Products Co.*, the Supreme Court allowed protection of a single colour (a green-gold shade for press pads) but emphasised that colours essential for competition must remain free.² Similarly, in *Traffix Devices, Inc. v. Marketing Displays, Inc.*, the Court clarified that functional features, whether utilitarian or aesthetic, are ineligible for trademark protection.³

Fashion disputes have sharpened the doctrine. In *Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc.*, the Second Circuit upheld Louboutin's red sole trademark, but only when applied in contrast to the rest of the shoe.⁴ This nuanced decision illustrated how courts attempt to prevent monopolising desirable design features while preserving trademarks' role as source identifiers. Scholars remain divided. McKenna argues that aesthetic functionality reflects trademark law's "identity crisis," where courts oscillate between protecting brand signals and safeguarding market competition.⁵ Dinwoodie observes that non-traditional marks like colours and patterns blur these boundaries further.⁶

European Union

The EU addresses aesthetic concerns under Article 7(1)(e) of the EU Trade Mark Regulation (EUTMR), which excludes from registration signs consisting exclusively of

- (i) the shape resulting from the nature of the goods,
- (ii) the shape necessary to achieve a technical result, or
- (iii) The shape gives "substantial value" to the goods.⁷

In *Hauck GmbH v. Stokke A/S*, the CJEU held that a children's chair design could not be registered because its aesthetic appeal conferred substantial value.⁸ This interpretation aligns

² *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165–66 (1995).

³ *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29–30 (2001).

⁴ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 227–28 (2d Cir. 2012).

⁵ Mark P. McKenna, *Aesthetic Functionality and Trademark Law's Identity Crisis*, 39 *Hofstra L. Rev.* 827, 832 (2019).

⁶ Graeme B. Dinwoodie, *Non-Traditional Marks and the Expansion of Trademark Law*, 41 *Eur. Intell. Prop. Rev.* 453, 454–55 (2019).

⁷ Regulation (EU) 2017/1001, of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark, art. 7(1)(e), 2017 O.J. (L 154) 1.

⁸ *Hauck GmbH v. Stokke A/S*, Case C-205/13, EU:C:2014:2233.

with the rationale of aesthetic functionality. However, in *Christian Louboutin v. Van Haren Schoenen BV*, the Court distinguished between colour and shape, allowing Louboutin's red sole to be protected as it was not deemed a shape per se.⁹

Commentators note that the EU's "substantial value" exclusion resembles aesthetic functionality but is narrower. Aplin argues that while EU law effectively bars monopolisation of designs of aesthetic appeal, it leaves open grey areas in patterns and textures.¹⁰

Comparative Observations

The U.S. favours judicial flexibility, while the EU embeds exclusions in statutory text. Both systems converge on one principle: competition must not be distorted by granting exclusivity over features consumers value for their beauty alone. India can draw from both, tailoring an approach that suits its fast-growing fashion sector.

Indian Legal Frameworks and the Silence in Aesthetic Functionality

India's Trade Marks Act, 1999, incorporates exclusions similar to the EU framework. Section 9(3) prohibits registration of shapes that

- (i) result from the nature of the goods,
- (ii) are necessary for a technical result, or
- (iii) give substantial value to the goods.¹¹

The last clause implicitly addresses aesthetic concerns, but Indian courts rarely interpret it in depth.

Judicial Developments

The Delhi High Court's ruling in *Christian Louboutin SAS v. Pawan Kumar* recognised the red sole as a well-known trademark in India.¹² Yet the judgment focused on reputation and

⁹ *Christian Louboutin v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

¹⁰ Tanya Aplin, *Trademarks, Aesthetics and Competition: The EU Approach*, 48 *Int'l Rev. Intell. Prop. & Competition L.* 391, 398 (2021).

¹¹ Trade Marks Act, 1999, No. 47 of 1999, INDIA, § 9(3).

¹² *Christian Louboutin SAS v. Mr. Pawan Kumar*, CS (COMM) 714/2016, Delhi High Court (2018).

distinctiveness, avoiding whether such an aesthetic feature should remain available for competitors. The settlement that followed closed the door on a doctrinal clarification. Similarly, in *Colgate Palmolive Co. v. Anchor Health & Beauty Care*, the court protected the trade dress of toothpaste packaging, emphasising consumer confusion. Still, it did not interrogate whether elements like colour or layout serve primarily aesthetic purposes.

Recent scholarship criticises this pattern. Sen notes that Indian courts' heavy reliance on confusion analysis has created an "over-inclusive protection regime" ill-suited for the design-driven fashion industry.¹³ Kulkarni similarly argues that the absence of aesthetic functionality risks allowing global brands to appropriate culturally significant motifs under the guise of trademarks.¹⁴

Why the Silence Matters

This judicial silence generates three pressing concerns for India:

- **Overprotection:** Without aesthetic functionality, brands could monopolise desirable colours, patterns, or motifs indefinitely.
- **Uncertainty for Designers:** Emerging designers face unclear boundaries when drawing on traditional or global motifs.
- **Risk to Cultural Commons:** Indigenous crafts block prints, ikats, embroidery may inadvertently be captured by aggressive trademark enforcement.

As Basheer observes, India must guard against the "creeping expansion" of trademarks into domains meant for designs and copyright.¹⁵

Overlap between Trademark and Design Law in Fashion

Design regimes have been used in protecting fashion designs which are traditionally limited in length. The protection of novel designs in India has a limited duration. The Designs Act of 2000

¹³ Ananya Sen, *The Expanding Contours of Trade Dress Protection in India: Need for a Functionality Check*, 12 *Indian J. Intell. Prop. L.* 87, 102 (2022).

¹⁴ Ritvik Kulkarni, *Trademarking Fashion in India: The Missing Doctrine of Aesthetic Functionality*, 16 *NALSAR Student L. Rev.* 203, 212–13 (2023).

¹⁵ Shamnad Basheer, *Of Trademarks and Aesthetic Functionality: Lessons for India*, *SpicyIP Blog* (Oct. 2021), <https://spicyip.com>.

gives a duration of up to fifteen years protection to novel designs.¹⁶ Compare This is a potential lifetime protection given by trademark law.

This does not have a well-articulated doctrine of aesthetic functionality that allows the field of trademark law to encroach upon the sphere of design law, and hence makes it easier to evergreen design rights. Jurisdictions that have embraced approaches of comparativeness take initiatives to prevent such overlap. The aesthetic functionality doctrine is used by judges in the United States so that the trademark law does not replace an expired design patent¹⁷, thus, and the European Union policy of omitting the exception of substantial value maintains the fidelity of the design protection¹⁸.

The Indian courts rarely examine whether the trademark claims are used to renew the claim of expired or unregistered design rights. This kind of lacuna compromises the domestic consistency of intellectual-property law, and becomes a danger to the balance of competition in the fashion sector¹⁹.

Trade Dress and Aesthetic Functionality

Trade dress protection, including the general look and feel and configuration of a product or product packaging, has taken on an increased role in the field of fashion litigation. Judicial protection of trade dress often turns on factors of distinctiveness and likelihood of confusion, while there is a lack of scrutiny as to possible aesthetic functionality of the trade dress elements.

Within the fashion system, trade dress means colour schemes, spatial arrangements, patterns or visual motifs that evoke a sense of consumers attraction that is independent of demarcation with the brands. The failure to consider aesthetic functionality when making protection over such components inculcates a tendency to prohibit competitors in the use of ubiquitous or wanted design lexicon.

Indian jurisprudence, particularly in a case of adjudications on the issue of packaging and the visual presentation, give a whiff in favour of the trademark proprietors. Though this orientation may be justified in those cases in which there is a demonstrable confusion in the minds of

¹⁶ Designs Act, No. 16 of 2000, §§ 11–13 (India)

¹⁷ *TrafFix Devices*, 532 U.S. at 29.

¹⁸ Regulation 2017/1001, art. 7(1)(e)(iii)

¹⁹ Dev Gangjee, *Paying the Price for Admission*, 42 IIC 499 (2011)

consumers, it creates problems in cases where the supposed trade dress derives its economic value largely from aesthetic appeal.

Integrating an analysis of aesthetic functionality into trade dress analysis would limit the scope of protective rights to those elements empirically functioning as true source identifiers, avoiding the unnecessary extension of such rights to features that are (empirically and actually) necessary for fair competitive competition by competitors.

Consumer Perception, Market Power and Distinctiveness

The law of Trademark pays a lot of attention to the perception of the consumers and the achievement of the received specificity. However, in the fashion industry, consumer groups are often culturally habituated based on beauty and not identification of origin. Researchers warn that the popularity should not be confused with other functional utilities of a trademark²⁰.

In a market situation dominated by global fashion brands, consumer recognition too much may be used to cement market power and marginalize emerging designers²¹, in which case aesthetic functionality approaches would force such courts to determine whether protection would unnecessarily restrain competition.

Cultural Aesthetics and the Risk of Appropriation

The fashion industry in India is based much on the traditional designs and the community designs. Common patterns, forms of embroidery, colour patterns and so on usually are expressions of the culture as a whole not the individual creator. The trademark law is ideal based on its use and distinctiveness, which makes it unsuited to defend such communal creativity²². The unacknowledged aesthetic functionality would permit brands to pirate and commercialise cultural aesthetics by invoking trademark claims and therefore eradicate the artisan actualisation of their heritages²³.

Interface Between Aesthetic Functionality and Competition Law

Trademark law and competition law are tied together by a mutual goal; the preservation of fair

²⁰ Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 Va. L. Rev. 67 (2012)

²¹ Irene Calboli, *Trademark Overprotection*, 50 Wm. & Mary L. Rev. 2021 (2009)

²² Madhavi Sunder, *From Goods to a Good Life*, 36 Yale J. Int'l L. 1 (2011)

²³ Shamnad Basheer, *Monopolising Culture Through IP Law*, 45 Econ. & Pol. Wkly. 37 (2010)

competition. Aesthetic functionality permits this intersection between these two regulatory frameworks by ensuring that intellectual property rights do not set up unjustified barriers in the market.

The grant of exclusive rights regarding aesthetically pleasing features can prohibit markets from entering a market, reduce consumer choice and distort competition, which the goals of competition law are intended to avoid. In jurisdictions like United States, courts expressly follow this competition rationale in the application of aesthetic functionality.

The body of Indian competition jurisprudence has not yet had a meaningful intersection with the disputes on trade marks in the fashion space. Nonetheless, too much trademark protection with respect to aesthetic features may raise scrutiny under provisions pertaining to abuse of dominance or anti- competitive agreements.

A competition oriented interpretation to aesthetic functionality would bring trademark law in harmony with the wider goals of market regulation in India.

Fashion: The Interwoven Social and Judicial Narrative

The fashion industry goes beyond its traditional understanding as a simple manufacturer of clothes and accessories; it is a dynamic socio-cultural practice that is intertwined with cultural identity, power relations and economic structures. As a visual form of communication, fashion reflects societal values, pecking order, ways of fighting back, and dreams. Consequently, the legal regulation of fashion, in particular through intellectual property law, cannot be separated from the socio-cultural context in which it exists. Trademark conflicts within this sector, therefore, reflect not only the seemingly commercial interests of protection but also a judicial attitude toward culture, creativity and competition that can be discerned in the law.

Historically, judicial practice has wavered between respect for fashion as a form of ephemera, and appreciation of it as a serious commercial enterprise deserving serious legal protection. Such ambivalence can be found in the juridical context of trademark law, where adjudicators are asked to determine very often whether a particular aesthetic attribute is functional as a source identifier or merely aesthetic for the purpose of being an attractive design feature. These determinations are rarely appealed to as value neutral, and reflect judicial perceptions of the function of fashion in society - either as a form of artistic expression, a commercial brand or a

cultural commodity.

The socio-meaning of fashion creates problems for normal trademark analysis. Consumers do not interact with fashion goods in the purpose of origin identification, they consume fashion as a form of symbolism to obtain status and to express their own personality. Colours, patterns and silhouettes often have a meaning independent of brand identity. Judicial insistence on consumer association, without any serious inquiry into the rationale for such associations, runs the risk of confusing cultural popularity with trademark distinctiveness. This phenomenon is most prominent in litigation involving luxury labels, which factors such as market dominance and aspirational branding have been shown to play a role as well as identification at the source of the goods.

From a judicial point of view, the trademark law has been increasingly used to regulate fashion markets by controlling imitations. While the avoidance of consumer confusion is a legitimate goal, it must be recognized that imitation is an important piece that fits into the creative process of fashion. The spread of trends - in this case, from haute couture to the mass retail - has driven innovation, accessibility and cultural flow throughout history. Trademark protection in excess of what can be reasonably considered aesthetic upsets this balance and encases fashion within a legally controlled sphere at the loss of a socially shared sphere.

In the Indian scenario, the sociocultural aspect of fashion takes on a greater importance. Fashion aesthetics often borrow from traditional crafts, regional identities and group cultural expressions. Judicial acceptance of expansive claims for trademarks on such aesthetics threaten to unground fashion from its social substratum at the same time as they promote the existence of corporate proprietorship to the exclusion of a communal creativity. Accordingly, courts play a key mediatory role between private brands interests and the public cultural.

The doctrine of aesthetic functionality can be considered a judicial tool that recognizes the duality of fashion - both commercial and cultural. By limiting protection of trademarks over features whose main value stems from aesthetics, the courts are in effect saying that not all types of designs that have social significance are deserving of ownership protections. In this regard, aesthetic functionality acts as a function going beyond a technical doctrine instead as normative pronouncement of the delimitation of the legal ownership in culturally expressive industries.

Fashion law therefore is a blend of a social and legal narrative, in which legal doctrines create and are created by cultural practices.

A jurisprudence sensitive to this narrative therefore requires balance between the protection of brand and the promotion of cultural flexibility, between monetary incentives and creative openness, between legal clarity and social legitimacy. A recognition of aesthetic functionality in trademark law is a step towards such a balance in judicial thinking and, hence, legal protection of and social access to fashion.

The Future of Aesthetic Functionality in Digital and Fast Fashion

The wave of fast fashion, digital marketplaces and social media-fuelled trends have led to the escalate importance of aesthetic functionality. Designs spread quickly, trends are short lived and consumer preferences change at unprecedented rates.

In this context, extending long term trademark protection to ephemeral aesthetic purchasing functions runs the risk of freezing fashion cycles - and penalizing small players. Digital fashion, non-fungible tokens, and virtual clothes further make that even more complicated, as aesthetic appeal becomes more important in comparison to brand recognition.

A progressive doctrine of aesthetic functionality has to deal with these realities. Indian trademark law should ensure that protection does not lag behind innovation, but does not compromise competition in physical and digital fashion markets.

Cooperative Lessons from the U.S. and the EU

India can learn three key lessons from abroad.

- Flexibility (from the U.S.): Judicially developed doctrines allow courts to adapt to evolving markets and fashion trends.
- Clarity (from the EU): Codified exclusions reduce uncertainty, providing clear guardrails for brand owners and competitors.
- Consumer-Centric Balance: Both systems highlight that trademarks exist to prevent confusion, not to grant monopolies over beauty.

By integrating these lessons, India can frame a doctrine that preserves competition while protecting genuine brand identifiers.

Challenges in Applying Aesthetic Functionality to Fashion

Applying aesthetic functionality in fashion is not straightforward.

- **Subjectivity of Beauty:** Determining whether a feature provides “substantial value” is inherently subjective.
- **Overlap with Other IP Regimes:** Fashion designs may be protected under the Designs Act, 2000 or the Copyright Act, 1957, raising risks of overlapping monopolies.²⁴
- **Judicial Reluctance:** Indian courts traditionally favour broad protection for brands. Shifting to competition-oriented reasoning will demand judicial restraint.
- **Cultural Dimensions:** Many Indian fashion features are rooted in traditional craft. Overprotection could harm artisans by fencing off motifs that should remain part of cultural heritage.

As Sunder argues, fashion law globally reflects the tension between creativity and commodification; India must avoid tipping the balance toward over-commodification.²⁵

Towards Reform: Judicial and Legislative Directions

Judicial Reform

Indian courts should interpret Section 9(3)(c) to recognise aesthetic functionality explicitly. For example, courts could ask whether competitors require access to that colour to compete fairly when evaluating colour marks. This would align India with both the U.S. and EU practices.

Legislative Clarification: Parliament could amend the Trade Marks Act to include an explicit aesthetic functionality exclusion, modelled on the EU’s “substantial value” clause but extended to cover non-shape marks such as patterns and colours.

²⁴ WIPO, Study on the Interface Between Trademarks and Industrial Designs 12 (2020), <https://www.wipo.int/publications>.

²⁵ Madhavi Sunder, IP in Fashion: Between Creativity and Commodification, 53 Va. J. Int’l L. 425, 431 (2020).

Administrative Guidance

The Trademark Registry could issue examination guidelines similar to the USPTO's Nontraditional Marks Guide, clarifying how examiners should treat aesthetic features.²⁶

Protecting Indigenous Creativity

Any reform must safeguard India's cultural commons. Vaidya notes that Indian fashion law must be sensitive to indigenous design practices, ensuring that overzealous trademark claims do not undermine traditional creativity.²⁷

Conclusion

Aesthetic functionality underscores a central tension in fashion law: trademarks should protect brand identity, not monopolise beauty. The U.S. has developed a flexible doctrine, the EU codifies substantial value exclusions, while India remains largely silent. This silence creates risks of overprotection, inconsistency, and harm to cultural heritage.

The path forward for India lies in judicial recognition, legislative refinement, and administrative guidance, informed by comparative lessons. By explicitly embracing aesthetic functionality, India can ensure its fashion industry thrives on creativity and fair competition, rather than the monopolisation of aesthetics.

²⁶ U.S. Patent & Trademark Office, Nontraditional Marks Examination Guide (2021).

²⁷ Ashwini Vaidya, Fashion Law in India: Challenges of Protecting Non-Traditional Marks, 7 J. Nat'l L. U. Delhi 143, 159 (2022).