

Trade Marks:

Unlocking Brand Protection *Part 5*

The Holistic Paradigm of Trade Dress and Get-Ups in Nigeria



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The modern commercial environment in Nigeria has moved beyond the era where brand identity was defined solely by a catchy name or a striking logo. In a marketplace characterised by rapid-fire consumer decisions and an increasing density of competing products, the "look and feel" of a brand, its trade dress and get-up, has emerged as a primary and strategic asset in the intellectual property portfolio. Following the previous instalments of this series, which addressed the technicalities of registration¹, post-registration management², and the hazards of non-use³. This fifth part explores the multifaceted legal landscape of trade dress and get-ups. This paradigm shift in brand protection focuses on the total image and overall appearance of a product or business, encompassing everything from packaging aesthetics and colour schemes to the architectural layout of a retail space.

The Conceptual Evolution of Visual Identity

The terminology within Nigerian intellectual property jurisprudence reflects a blend of traditional English common law and modern international standards. The term "get-up" is historically rooted in the common law of passing off, describing the "dress" or "attire" in which a product is presented to the public, such as labels, wrappers, and containers.⁴ Conversely, "trade dress" is a term popularised by United States legislation, specifically the Lanham Act, which has increasingly influenced Nigerian legal discourse through the globalisation of brand management strategies. Both terms denote the non-functional physical or visual appearance of a product that makes it distinctive in consumers' eyes.⁵

In Nigeria, this visual identity is particularly critical in industries where consumer literacy levels vary or in high-speed environments, such as open markets or supermarkets. A consumer may not always read the specific brand name on a detergent box or a beverage bottle. Still, they will recognise the signature combination of colours, the specific curvature of the container, or the unique pattern of the graphics. This reliance on visual cues creates a psychological link between the appearance of the product and its commercial source, a link that the law seeks to protect through a combination of statutory registration and common law remedies.

The Business Facilitation Act 2022 and the 1965 Framework

For over half a century, the Nigerian Trade Marks Act of 1965 (Cap T13 LFN 2004) served as the primary legislative instrument for brand protection. However, the Act was often criticised for its inability to keep pace with modern branding trends, specifically its silence on non-conventional trademarks such as product shapes and standalone packaging.⁶ Under the 1965 framework, Section 67 defined a "mark" to include a "device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof". This narrow definition forced brand owners to register their packaging or

¹ Part 1: <https://advocaat-law.com/wp-content/uploads/2025/05/Trade-Marks-Unlocking-Brand-Protection.pdf>

Part 2: <https://advocaat-law.com/wp-content/uploads/2025/06/Fundamentals-of-Trade-Marks-Registration-in-Nigeria-part-2.pdf>

² Part 3: <https://advocaat-law.com/wp-content/uploads/2025/10/Trade-Marks-Unlocking-Brand-Protection-Part-3-Now-That-You-Have-Filed-Your-Mark-Post-Registration-Matters.pdf>

³ Part 4: <https://advocaat-law.com/wp-content/uploads/2026/04/Trade-Marks-Unlocking-Brand-Protection-Part-4-Avoiding-Non-Use-Pitfalls-and-Navigating-Cancellation-Proceedings.pdf>

⁴ TRADEMARK PROTECTION OF TRADE DRESS IN THE NIGERIAN LUXURY FASHION INDUSTRY - Record Of Law, <https://recordoflaw.in/trademark-protection-of-trade-dress-in-the-nigerian-luxury-fashion-industry/>

⁵ Dress to impress : all about trade dress - iPleaders, <https://blog.ipleaders.in/dress-impress-trade-dress/>

⁶ THE CHALLENGES OF TRADEMARK PROTECTION LAW IN NIGERIA BY IBIJOKE PATRICIA BYRON LL.B. Hons., <https://pgsdSPACE.ictp.it/xmlui/bitstream/handle/123456789/848/byron.pdf?sequence=1&isAllowed=y>

product shapes as "device marks," a legal fiction that often proved inadequate when challenged in court.

The landscape underwent a tectonic shift with the enactment of the Business Facilitation (Miscellaneous Provisions) Act 2022 (BFA), which was signed into law in February 2023. The BFA was designed as an "omnibus" legislation to promote the ease of doing business and modernise existing statutes. Crucially, it amended the Trade Marks Act to expand the definition of a trademark to explicitly include the "*shape of goods, packaging, and combinations of colours*". This amendment effectively elevated trade dress from an auxiliary "device" to a primary registrable asset, providing a clearer statutory path for brands to protect their holistic identity.

The Requirement of Graphical Representation in the Digital Era

Even with the expanded definitions under the BFA, the fundamental prerequisite for registration remains the ability of the mark to be represented graphically. In the context of trade dress, which may involve three-dimensional shapes or complex colour arrangements, this requirement poses unique challenges. The Nigerian Trademark Registry has transitioned to electronic filing, necessitating precise digital specifications for representations.⁷

For a trade dress or "get-up" to be successfully registered, the applicant must provide a clear and distinct representation. If the mark is a product shape, multiple views (front, side, top) may be necessary to define the claim's scope. Current Registry practices specify that images should be uploaded in JPEG format, with a minimum resolution of 1200 dpi, typically fitting within dimensions of 120px by 100px. The clarity of this representation is not merely a formality; it defines the legal boundaries of the proprietor's monopoly. If the graphical representation is vague, the Registry may refuse the application or require a disclaimer on certain non-distinctive parts of the mark.

Distinctiveness: Inherent vs. Acquired

The core of trademark eligibility is the mark's ability to distinguish the goods of one proprietor from those of others in the course of trade. For trade dress, distinctiveness is evaluated through two primary lenses: inherent distinctiveness and acquired distinctiveness (secondary meaning).

Inherent Distinctiveness in Design

A trade dress is inherently distinctive if its configuration is so unique, fanciful, or arbitrary that consumers would immediately perceive it as a source identifier. In the luxury fashion industry, for example, a highly unusual architectural drape of a gown or a non-standard arrangement of beadwork might qualify as inherently distinctive.

⁷ Trademark Filing Procedure - Nigerian Industrial Property Office, <https://nipo.gov.ng/trademark.jsp>

Acquired Distinctiveness (Secondary Meaning)

Many elements of trade dress, such as standard bottle shapes or common colour combinations, are not inherently distinctive. In these instances, the applicant must demonstrate that the mark has acquired "secondary meaning" through extensive and exclusive use in the Nigerian market. The Registry and the courts look for evidence that the "get-up" has become so notoriously attributable to the proprietor that its use by a competitor would cause inevitable confusion.

To establish secondary meaning in Nigeria, businesses typically rely on evidence such as:

- Long and continuous use of the packaging or design;
- High sales volumes and market penetration;
- Extensive advertising and promotional expenditure;
- Media recognition and industry reputation; and
- Evidence showing that consumers associate the visual appearance with a single commercial source

The Non-Functionality Doctrine

A critical limitation on trade dress protection is the doctrine of non-functionality, which ensures that trademark law does not extend its reach into the domain of patent or industrial design law. A feature is functional if it is essential to the use or purpose of the product or if it affects the product's cost or quality. For example, the shape of a tyre tread is primarily functional (intended to provide grip), and therefore, it cannot be registered as a trademark even if consumers recognise it.

Nigerian courts are increasingly vigilant about this distinction. If a product configuration achieves a technical result that cannot be achieved through other shapes, it is deemed functional and excluded from trademark protection.⁸ This rule prevents businesses from using trademark law, which provides for potentially perpetual protection, to block competitors from using useful or efficient product features that should be free for public use once a patent or design right expires.

The 'Ferodo' Standard and Packaging Protection

The practical application of these principles is best understood through the lens of Nigerian case law, where the judiciary has wrestled with the boundaries of registered and unregistered trade dress. The seminal authority in this area is the Supreme Court decision in *Ferodo Ltd. v Ibeto Industries Ltd.*⁹

Ferodo centred on the packaging of brake pads. Ferodo Ltd. had registered the word mark "Ferodo" but utilised a distinctive "get-up" on its packaging, featuring a red cardboard box, a smaller black rectangle, and a black-and-white checkered strip. Ibeto Industries entered the market with "Union" brand brake pads, using packaging that mirrored this visual layout almost exactly.

⁸ Interrogating the Place of Industrial Design in Boosting Economic Growth and Development Eric Efe Ughumiakpor* Oghenemine Stephe - Nnamdi Azikiwe University Journals, <https://journals.unizik.edu.ng/index.php/icpl/article/download/5608/4655/12783>

⁹ (2004) 5 NWLR (Pt. 866) 317.

The Supreme Court's ruling established several foundational principles for Nigerian brand owners:

1. **The Registration Rule:** The Court held that only the elements expressly registered receive statutory protection. Because Ferodo had only registered the word, it could not claim a statutory monopoly over the "garnishing" or decorative elements of the package.
2. **The Nature of Ornamentation:** The Court observed that fanciful or ornamental characters which colour a package do not automatically form part of the trademark unless they are registered as a "device".
3. **Monopoly of Colour:** The Court was reluctant to grant an exclusive right to a single colour (red) without proof that the colour itself had acquired secondary meaning.

This decision highlights a critical strategic insight: brand owners must specifically register their "get-up" as a device mark or a composite mark to sustain an action for statutory infringement. Relying solely on a word mark while ignoring the visual packaging leaves a brand vulnerable to mimicry.

The Trebor Peppermint Precedent

In contrast to the strict statutory interpretation in *Ferodo*, the case of *Trebor Nigeria Limited v. Associated Industries Limited*¹⁰ provides a robust defence for visual identity through the lens of passing off. The makers of Trebor Peppermint successfully sued a competitor whose "Minta Supermint" utilised a wrapper so similar in appearance that it was calculated to deceive the public. The court found that even if the brand names were different, the "get-up" was the primary indicator of source for the consumer, and the similarity in packaging was enough to constitute passing off.

Passing Off

While registration provides the most secure path to enforcement, many brands in Nigeria rely on the common law tort of passing off to protect their unregistered trade dress. Section 3 of the Trade Marks Act explicitly preserves the right of action for passing off, stating that nothing in the Act shall affect rights against any person for passing off goods as those of another.

The Classic Trinity of Passing Off

To succeed in a passing-off action, a claimant must establish three elements commonly known as the "classic trinity":

1. **Goodwill:** the claimant's business or packaging must have acquired market reputation;
2. **Misrepresentation:** the defendant must have presented its goods in a manner likely to deceive consumers; and
3. **Damage:** the claimant must show actual or likely commercial harm resulting from the misrepresentation.

¹⁰ (1971) All N.L.R. 468

Passing off remains especially important in Nigeria, where many businesses rely heavily on market reputation but may not yet have secured comprehensive trademark registrations.

Overlapping Protection: Industrial Designs and Copyright

Trade dress protection frequently overlaps with other intellectual property rights.

Under the Patents and Designs Act, businesses may register industrial designs to protect the aesthetic appearance of products. Industrial design law focuses on novelty and visual appeal, while trademark law focuses on source identification. A unique bottle design, for example, may qualify for both industrial design protection and trade dress protection.

The practical advantage of this overlap is that industrial designs provide immediate protection for novel appearances, while trademark protection can continue indefinitely once the design acquires source-identifying significance.

The Copyright Act 2022 may also protect graphic elements appearing on packaging as artistic works. Copyright protection arises automatically upon creation. However, Nigerian law restricts the use of copyright to protect designs intended for industrial mass production. Once artistic works are commercially reproduced on a large scale, industrial design protection usually becomes the more appropriate legal framework.

NAFDAC and Regulatory Enforcement

Trade dress disputes in Nigeria are not limited to courtroom litigation. Regulatory agencies, particularly the National Agency for Food and Drug Administration and Control (NAFDAC), play an important role in preventing consumer confusion.

NAFDAC's product registration and labelling regulations prohibit deceptive or confusing packaging for regulated products such as foods, beverages, drugs, and cosmetics. Applicants are often required to provide evidence of trademark registration or acceptance, and NAFDAC may refuse approval for packaging that resembles existing products too closely.

This administrative oversight provides businesses with an additional enforcement mechanism. In some situations, reporting infringing "look-alike" products to NAFDAC may achieve faster practical results than prolonged litigation.

Strategic Protection of Trade Dress in Nigeria

The evolving Nigerian legal framework demonstrates that trade dress should no longer be treated as a secondary branding consideration. Businesses seeking comprehensive brand protection should adopt a layered intellectual property strategy.

This includes:

- Registering not only word marks but also packaging, labels, and device marks;
- Protecting novel product appearances through industrial design registration;
- Maintaining evidence of market use and consumer recognition;
- Monitoring the market for imitations and confusingly similar products; and
- Using regulatory mechanisms, including NAFDAC complaints, where appropriate.

The Business Facilitation Act 2022 has modernised Nigerian trademark law and aligned it more closely with contemporary commercial realities. Nevertheless, the lessons from cases such as *Ferodo* remain highly relevant: visual identity must be intentionally protected through proper registration and strategic enforcement.

In Nigeria's increasingly competitive marketplace, the overall appearance of a product often determines consumer recognition and purchasing behaviour. Trade dress and get-up are therefore no longer merely aesthetic considerations. They are central commercial assets capable of defining brand reputation, market distinction, and long-term competitive advantage.

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