## 15.3 Definition—Trade Dress (15 U.S.C. § 1125(a))

Trade dress is the non-functional physical detail and design of a product or its packaging, which [indicates] [or] [identifies] the product’s source and distinguishes it from the products of others.

Trade dress is the product’s total image and overall appearance, and may include features such as size, shape, color, color combinations, texture, or graphics. In other words, trade dress is the form in which a person presents a product to the market, its manner of display.

[*Name of corporation, if a party*] is a person as that term is used in these instructions.]

**Comment**

In a trade dress case, it is reversible error to fail to give an instruction defining non-functionality. *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 842-43 (9th Cir. 1987). For such an instruction, *see* Instruction 15.12 (Infringement–Elements–Validity–Trade Dress–Non-Functionality Requirement); Instruction 15.7 (Infringement–Elements and Burden of Proof–Trade Dress).

Trade dress encompasses the design of a product. Unregistered trade dress requires a showing of non-functionality, distinctiveness, and likelihood of confusion to support a finding of infringement. *See Wal-Mart Stores, Inc., v. Samara Bros., Inc.*, 520 U.S.205, 210 (2000); *Two Pesos, Inc. v. Taco Cabana, Inc*., 505 U.S. 763, 765 n. 1 (1992) (noting that trade dress involves “the total image of a product and may include features such as size, shape, color or color combination, texture, graphics, or even particular sales techniques.”); *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001) (noting that “the design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source; and a design or package which acquires this secondary meaning, assuming other requisites are met, is a trade dress which may not be used in a manner likely to cause confusion as to the origin, sponsorship, or approval of the goods. In these respects, protection for trade dress exists to promote competition.”). *See generally* 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 8 (5th ed. 2019).

A corporation is a person.  *See* Instruction 4.2 (Liability of Corporations–Scope of Authority Not in Issue).

Depending on the particular good or service to which the trade dress at issues applies, the instruction should be modified as indicated below:

**Product Packaging Cases**

Trade dress may involve the packaging or wrapping of the product at issue. This is the most frequent type of trade dress case. If such trade dress is at issue, the court may add the following after the third paragraph of this instruction:

In this case, you will hear evidence about the manner in which *[insert description of good*] was [packed] [wrapped] [boxed] [held in a container]. Trademark law protects such trade dress from others using the same or similar presentation of another product if that trade dress is non-functional and if consumers identify the packaging with the source of the product, distinguishing it from other sources.

Trade literature used in marketing constitutes trade dress. Unauthorized use by a competitor constitutes false designation of origin and unfair competition.

**Product Design or Configuration Cases**

Trade dress may be other than the packaging of the product. It may constitute the design or overall appearance or configuration of the product itself. In such cases, because the source identifying aspect is part of the physical product itself, functionality is an important issue. If such trade dress is at issue, add the following after the third paragraph of this instruction:

Trade dress concerns the overall visual impression created in the consumer’s mind when viewing the non-functional aspects of the product and not from the utilitarian or useful aspects of the product. In considering the impact of these non-functional aspects, which are often a complex combination of many features, you must consider the appearance of features together, rather than separately.

*See Millenium Labs., Inc. v. Ameritox, Ltd.*, 817 F.3d 1123 (9th. Cir. 2016) (holding that publication formats may be protectable trade dress); *Two Pesos, Inc., v. Taco Cabana, Int’l Inc.,* 932 F.2d 1113 (5th Cir. 1991), *aff’d,* 505 U.S. 763, 770-73 (1992); *Vision Sports, Inc. v. Meville Corp.*, 888 F.2d 609, 613 (9th Cir. 1989).

**Business Image Cases**

Although this instruction addresses the trade dress of a product, the cases suggest that services might also have a protectable trade dress. *See Two Pesos, Inc.*, 505 U.S. at 764-65 (noting that trade dress may include “even particular sales techniques”); *Fuddruckers, Inc.*, 826 F.2d at 841-42. This is treated much like trade dress comprised of product packaging. If business image trade dress is at issue in the case, the following paragraph can be added after the third paragraph of the instruction:

In this case, you will hear evidence about the manner in which [*insert name of business*] identifies its business and the product or services it sells. This is the total image of the business, suggested by the general shape and appearance of its business, such as its identifying signs, interior floor space, decor, equipment, dress of employees, and other features reflecting on the total image of the business.

*See Taco Cabana Int’l, Inc.*, 932 F.2d at 1113; *Clicks Billiards Inc. v. Sixshooters Inc*., 251 F.3d 1252, 1258-59 (9th Cir. 2001) (providing definition of trade dress).

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