

IP Litigator, Trade Dress Litigation, (Jul. 1, 2026)

IP Litigator

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Susan Kayser is a nationally recognized intellectual property litigator, brand strategist and AI counselor to international and emerging brands on trademark, advertising and copyright matters. She represents leading clients across the fashion, luxury, technology, consumer products and food and beverage sectors. Recognized as an “IP Trailblazer” and “IP All Star,” Kayser leads federal litigation in trademark, false advertising and copyright disputes – both obtaining and defeating preliminary injunctions – manages multibilliondollar global trademark portfolios and spearheads IP due diligence for brand acquisitions.

Keehle Amicon is an intellectual property associate handling a broad range of litigation, prosecution and licensing matters. Her practice is informed by her experience in the fashion industry, where she developed a practical understanding of how legal strategy intersects with evolving business and technological considerations. Amicon leverages strong research, drafting and analytical capabilities to evaluate and synthesize complex legal and factual issues, delivering clear, strategic advice that is both analytically rigorous and practical for clients.

Dupes, Design and Trade Dress: Drawing a Line After Apollo v. Sol de Janeiro

Can trade dress protection keep pace with the dupe economy? As lookalike products proliferate and skirt traditional counterfeiting rules, trade dress disputes have become a highstakes arena for brand owners. A recent Southern District of New York decision in *Apollo Health & Beauty Care Inc. v. Sol de Janeiro USA, Inc.* No. 1:22-cv-7719 (S.D.N.Y. March 17, 2026) delivers a clear message for consumer brands: Trade dress is a valuable shield, but it won’t protect every design choice.

Sol de Janeiro is widely known for its Brazilian Bum Bum Cream (the Cream), sold in a yellowandwhite rounded jar featuring an oversized lid with dark gray lettering. After Costco, a major national retailer, allegedly inquired about carrying the Cream without success, it requested that Apollo Health and Beauty Care (Apollo) develop a “dupe” product with a similar look, feel and performance. Apollo subsequently launched its Nutrius cream at Costco, where it was sold in a yellow-and-white rounded jar with a large, overhanging lid printed with the product name.

After Sol de Janeiro asserted unregistered trade dress rights in a ceaseanddesist letter, Apollo took the fight to court, filing a declaratory judgment action in the Southern District of New York to knock out the claimed trade dress as functional. Sol de Janeiro fired back with trade dress and trademark infringement counterclaims against Apollo – and retailer Costco.

Apollo’s first bid for summary judgment on functionality failed – but discovery of new facts marked a turning point in the litigation. Apollo uncovered that Sol de Janeiro had previously sought trade dress protection for the same packaging elements for similar products, only to have the USPTO reject them as functional, prompting the court to allow renewed briefing.

On March 17, the court handed Apollo a win, granting its summary judgment motion and holding that Sol de Janeiro’s asserted trade dress was functional – and therefore unprotectable. Looking at the packaging both feature by feature and as a whole, the court concluded that the Cream design elements served practical purposes, not brand identification. It also gave “great weight” to the USPTO’s prior functionality refusals.

The court emphasized that neither aesthetic intent nor alleged copying could transform functional packaging into protected trade dress. Apollo had introduced uncontroverted evidence that each element of the Cream jar improved the container's quality, including that it was based on a stock jar with a rounded bottom and oversized lid that made the product easy to open, and that the yellow color merely denoted the fragrance of the body cream and product benefit.

This decision highlights several key takeaways for brands and counsel navigating the dupe economy:

- **Align prosecution and litigation strategy.** What's in the USPTO record can shape the outcome in court.
- **Refresh protection and enforcement strategy.** Evidence of copying won't save a trade dress claim rooted in functional design.
- **Build layered protection.** Combining trademarks, design patents, copyright and unfaircompetition claims can deliver broader coverage, stronger remedies and greater leverage.

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