



HISTORY AND EVOLUTION OF TRADEMARKS IN INDIA

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ABSTRACT The study of history and evolution of a subject matter is important to gain deep knowledge of the specific area of study and the same has been explored as a part of the study on IPR management system in India. This paper presents in a short and concise manner the history and evolution of Trademarks in India.

INTRODUCTION:

A trademark is a visual symbol in a word form or in the form of colour, label, applied to products for sale with a view to indicate the consumer that the said product is manufactured by a particular person or organization with a definite source of origin and subsequently to differentiate that product from that of any other person's or organisation's product of similar type and function. By applications of this mark the manufacturer or seller gets a limited exclusive right to use the trademark in relation to that product. Such a right of the use of mark is recognised as a Trademark and can seek protection under common law or by registering it under the Trade Marks Act 1999 which has come over the earlier existing Trade and Merchandise Marks Act 1958.

The Trade Marks Act, 1999 and the Trade Marks Rules, 2002 govern the law relating to Trade Marks in India. The Trade Marks Act, 1999 protects the trademarks and their infringement that may get challenged by a passing off or infringement action. The Act protects a trade mark for goods or services, on the basis of either use or registration or on basis of both elements.

In case of trademark, unlike other IPRs, it is not necessary that the term or symbol chosen to be the mark, should be out of an invention which is novel, unique and previously unknown. The mark chosen for business can be a non-invented and adopted one as well. Eg: Apple, Tata. These marks may or may not necessarily be registered to claim ownership by their rightful owners.

Definition of Trademark as described in the Trade Marks Act 1999 is as below:

Section 2(1)(m):

Trademark must be a mark which includes a device, a brand heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;

Section 2(1)(zb):

i. Trademark 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; and

ii. In relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the

course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of the permitted user, to use the mark whether with or without the indication of the identity of that person, and includes a certification trade mark or collective mark;

Concept of trademark is based on three broad factors:

1. Distinctiveness or distinctive character, or capable of distinguishing
2. Deceptive similarity or similarity or near resemblance of marks
3. Same description or similarity of goods.

The purpose of Trademark Act is to provide for registration and better protection of trademarks or goods and services and to prevent the use of fraudulent marks.

Trademark must be considered to be a comprehensive term including within itself "trade name" as also mark; "business name" as also 'name' under which articles, goods, etc. are sold. This from the definition of "trade mark" and of "mark" as per the Act.

HISTORY OF TRADEMARKS IN INDIA

In India proprietary protection for marks is ancient. Around the 10th century, a mark synonymous as "merchants mark," appeared, and symbols among traders and merchants increased significantly. These marks, which can be considered one kind of "proprietary mark," essentially were used to prove ownership rights of goods like marking cattle, potteries, trading emblems on currencies, etc. In middle ages, craftsmen and merchants affixed marks to goods in order to distinguish their work from the makers of low quality goods and to maintain trust in the guilds. These marks, synonymous as "production marks," served to maintain monopolies. These production marks helped consumers to identify and assign responsibility for inferior products, such as, goods short in weight, goods comprised of poor quality materials, and goods made with inferior craftsmanship.

The Anglo Indian trademark law had its origin dating back to 1266. It was also called as the Bakers Marking Law. As the name suggests the law required bakers to place a mark on the bread that they made and sold, identifying the baker.

In the 20th century prior to 1940 there was no official Trademark Law in India. Numerous problems aroused on infringement, passing-off, etc and these were solved by application of section 54 of the specific relief act 1877 and the registration was adjudicated by obtaining a declaration for the ownership of a

trademark under Indian Registration Act 1908. To overcome the above difficulties the Indian Trademarks Act was passed in 1940, this corresponded with the English Trademarks Act. After this, AS Trade and commerce continuously grew, there was an increasing need for more protection of Trademarks. The replacement to this act was the Trademark and Merchandise Act, 1958. India became a party to the WTO at its very inception. One of the agreements in that related to the Intellectual Property Rights (TRIPS). In December, 1998 India acceded to the Paris Convention. Meanwhile, the modernization of Trade and Merchandise Marks Act, 1958 had been taken up keeping in view the current developments in trading and commercial practices, increasing globalization of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification of trademark management system and to give effect to important judicial decisions. To achieve these purposes, the Trademarks Bill was introduced in 1994. The Bill pointed towards the changes which were contemplated and were under consideration of the Government of India, but it lapsed in 1994. A comprehensive review was made of the existing laws in view of the developments in trading and commercial practices, and increasing globalization of trade and industry. The Trademarks Bill of 1999 was passed by Parliament that received the assent of the President on 30th December, 1999 as Trade Marks Act, 1999 thereby replacing the Trade and Merchandise Mark Act of 1958.

EVOLUTION OF TRADEMARKS IN INDIA

The replacement of Trademarks and Merchandise Act, 1958 gave rise to the Trademark Act 1999; by the Government of India so that the Indian Trademark Law gets compliant with the TRIPS obligation on the recommendation of WTO. The objective of the 1999 Act was to confer the protection to the user of the trademark on his goods and prescribe conditions on acquisition, and legal remedies for enforcement of trademark rights. For the first time it provided protection for service marks and give provision of registration for collective marks, it also differentiated between well-known trademarks and trademarks in general, and also special treatment and rights are envisaged for well-known trademarks. The act of 1999 gave police the right to arrest in case of infringement. There are some points of changes that are present between the 1958 act and 1999 act, it can be said that the 1999 act is a modification of the 1958 act, it has provided exhaustive definitions of terms frequently used, enhanced punishment for offenders, increased the period of registration, registration of non- traditional trademarks. The rules of this act are called as Trademark Rules 2002. Both the Act and its set of rules came to effect on 15 September 2003. The Trademark Act 1999 and Trademark rules 2002 presently govern Indian Trademark Laws in India

Trademark Act, 1999 identified other type of Trademarks as:

Service mark:

Service marks are marks or names used by businesses rendering various kinds of services. The new definition of 'service' has been included for the benefit of service-oriented establishments such as banking, communication, education, finance, insurance, hospitality, etc. A service mark is the same as a trade mark except that it identifies and distinguishes the source of a service rather than a product. Normally, a mark for goods appears on the product or on its packaging, while a service mark appears in advertising for the services.

Certification mark:

Provisions are also made in the Act for registration of Certification marks, whose function is not to indicate trade origin, but to indicate that the goods have been certified for certain characteristics in it. Eg: HALLMARK for Gold jewellery

indicating a particular level of quality.

Collective mark:

Trade Marks Act, 1999 has also made provisions for registration and protection of Collective marks, which is a mark owned by association of people for producing certain goods. Eg: AMUL, MAPRO, etc. The new definition of 'collective mark' has been provided for the benefit of members of an association of persons, but not partnership.

Over the period of time, trademarks gradually evolved in to the following:

Well-known trademarks:

Being a signatory to the Paris Convention and TRIPS, India recognizes the concept of a well-known trademarks. Under Section 2(1)(zg) of the Trade Marks Act, 1999 "well-known trade mark", in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

Generic Trademark:

The value of a trademark whether registered or not can be maintained only if the proprietor uses it and takes prompt action against infringement, or passing-off. If infringement of the mark is prevented, the mark is likely to become a generic name and the distinctiveness of the mark will be lost or eroded or diluted if other traders use the same or similar mark in relation to the same or similar goods or sometimes even different goods. Eg: Dalda, Bisleri, Xerox, etc. were registered trademarks but in due course of time the overwhelming popularity and unchecked use or reference of the mark by others, resulted in losing its distinctiveness and became generic.

Domain name Trademark

With modernization and the development of the world into an internet world saw the evolution of a new concept of domain name trademark. Every business on the internet has a domain name which is a unique address in cyber space at which the website is located. A user on internet will find the domain name highly useful in finding the goods or services of a particular company on its website with the designated domain name identifying it. Eg: information about the organization Tata and all its products and services can be found on its website with domain name www.tata.com

Trade Dress:

Trade dress refers to combination of elements that make up the look, feel, or environment of a product or business; the term can refer to individual elements of a product or business image as well as to the image the combination of those elements creates as a whole. Trade Dress is non-functional physical detail. Trade Dress may include a few important features like: Size, shape, design, colour, etc

Smell mark and Sound mark also evolved with time to differentiate products of particular origin with a distinct and identifiable Smell and/or Sound which is publicized in advertising to educate the consumers about this differentiating factor of the product.

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