

that "seeing is believing" (Barlow and Mollon 1982) but one comes to realize that seeing is only believing and beliefs are based on prejudice as well as fact.

In a study by Hastorf and Cantril (1954) a classic description of the biasness of selective perception is found. As per study — in a college level football game between Dartmouth and Princeton, an analysis of fans' perceptions shows that they saw two different games between two teams sitting in the same stadium on the same afternoon. The data indicate that there is no such thing as game exists in its own right and the people merely observe. The game exists for a person and is experienced by him or her in terms of his or her purpose. Out of all the occurrences going on in the environment, people select those that have some significance for them from their own egocentric position in the total scheme of things.

Whatever is perceived is different for different people, whether the object is a football game, a presidential candidate or a package of crackers. Individuals do not simply react to some stimulus from the environment in a predetermined way. They behave according to what is brought to the occasion and what each person brings is more or less unique. Therefore perception depends a great deal on personal factors. Past experiences and social interactions may help to form certain expectation that provide categories or alternatives that individuals use in interpreting stimuli. The narrower the individual's experience, the more limited his or her access to alternative possibilities.

**II. Perceptions and Expectations.** The interpretation of the incoming stimulus guided by selective attention is the perception, perceptual organization or perceptual interpretation of the stimulus. The typical course of perception proceeds from a real world object or event through a medium, to sensory surfaces and receptors and then to the central nervous system (Cutting 1987). Once the perception hits the central nervous system, inferences from the stimulus may be of two kinds. They may be deductively valid or inductively strong. Perception could be deductive if all premises came from stimulus information but that is hardly ever the case. Experience, familiarity or anticipation usually plays a part in passing stimulus information into perceptual objects. Therefore, most perception is inductive, with some premises coming from memory and cognition.

An example of the power of induction in attention and perception to a stimulus objects is illustrated by the connection to our sense organs. Whenever our interest in an object is derived from or connected to other interests, our senses adjust to form a close connection in all our behaviour and perception. The image in the mind is the attention and when awaiting a footstep, every stir in the wood is for the hunter his game and for the fugitive it is his pursuers. (Johnson and Dark 1986).

This power of induction to consumer responses can be typified by a story. Mr. X, was driving to work with a colleague who had just bought a new house and was in the process of preparing his lawn and garden. They drove by a sign that said "Bedding sale" and the colleague said to Mr. X that he wanted to go in and buy some plants. Mr. X said, I didn't think they sold plants at that store. Then on reaching there the colleague noticed that it was a furniture store selling mattresses. Actually he was so preoccupied with gardening that the sign "Bedding sale" for him meant a sale of bedding plants for the garden. He did not initially process the surrounding cues that indicated a furniture store but focused only on the sign that was relevant to him at the time. He was deductively weak and inductively strong in his perceptions.

**Illusory Conjunctions.** Sometimes people tell not what they saw but what they constructively have been. Experiments in cognitive psychology by Treisman and Schmidt (1982) suggest that individual features of objects are separately registered and that in the absence of focused attention, they may be wrongly combined to form illusory conjunctions. That is, people may state that they perceive some thing that they have not actually seen. The dimensions of colour and shape appear to be the most susceptible to separate coding and incorrect reconstruction by consumers.

The implication of these findings in illusory conjunctions suggests that if one see a small, blue triangle, only the labels "blue", "small" and "triangle" are registered. The individual then supplies his or her conscious image with the correct quantity of blue colouring to fill the specified area, regardless of how much colour was originally presented. Moreover, the person may use the image to colour the area within the specified shape, regardless of whether this matches the shape that was originally blue. The evidence of the

study places conscious seeing at a greater remove from physical stimulus than might intuitively be assumed. One may cognitively rearrange what is actually seen to coincide with what he think would most likely logically see.

### GESTALT PSYCHOLOGY

The specific principles underlying perceptual organization are often referred to as Gestalt psychology. Gestalt is a German word meaning— pattern, configuration, form or organization and its psychology was founded by Max Wertheimer (1880-1943) and his colleagues K. Koffka and W. Kohler. Gestalt has no direct translation in English, but is commonly defined as “the whole is more than the sum of its parts”.

The basic premise of Gestalt is that people do not experience the numerous stimuli they select from the environment as separate and discrete sensations. Rather, they tend to organize them into groups and perceive them as unified wholes. Thus, the perceived characteristics of even the simplest stimulus are viewed as a function of the whole to which the stimulus appears to belong (Schiffman and Kanuk 1991). For example, a grey piece of paper is gray only in relation to its background or to something with which it is compared. On a black background, it appears light; against a white background it appears dark. This type of perceptual organization is called figure and ground. The figure is usually perceived clearly because in comparison to its ground, it appears to be well-defined solid and in the forefront. The ground is usually perceived as hazy and in the background. The gray will be either figure or ground depending on the context. The eye does not perceive objects in isolation but rather with their surroundings.

Another example of Gestalt is grouping. Individuals tend to group stimuli automatically so that they form a unified picture or impression. The point of grouping is that patterns or forms of our experience cannot be explained by compounding elements. The perception of stimuli as groups rather than as discrete bits of information facilitates their memory and recall. For example it is easier to attend to the global features of a triangle than to broken component lines because the Gestalt property of closure makes the global figure perceptually more salient.

Figure and Background

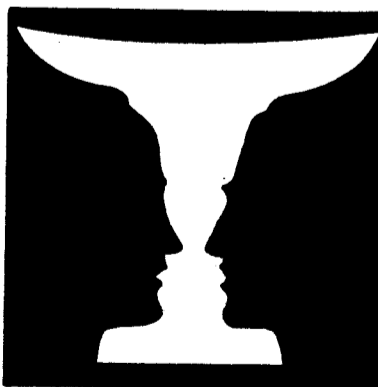


Fig. 3.6

In the branding case, the consumer may remember the total “look” of the package but may be unable to recall individually small details such as type of lettering, exact hue of colour or the specific picture on the package.

Some other types of perceptual organizations of Gestalt that affect our interpretation of the stimulus are:

- **Similarity.** Similar elements are seen as belonging to each other more than to other elements equally close but less similar. What the individual perceives from the environment belongs to

certain categories. For example, two packages of similar shape and colour each seen separately will likely be categorized in the person's memory in the same space. Therefore, the consumer may make a mistake in selecting one over the other because they are organized together. The two packages are too similar to be categorized separately in the consumer's mind.

Fig. 3.7, clarify the principle of similarity. Most individuals, when asked what they see in the Fig. 3.7, respond with two sets of four white squares and one set of four black dots. Seldom will people see two horizontal lines, each line consisting of squares and dots.

**Similarity**

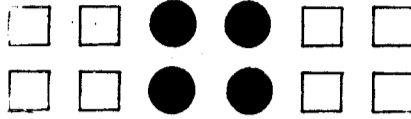


Fig. 3.7

- **Proximity** : Element that are physically close are seen as belonging to each other more than to similar elements that are farther away. Proximity can also make things look more alike than they really are.

**Proximity**

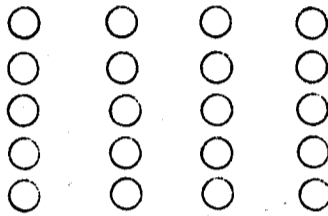


Fig. 3.8

In Fig. 3.8, the usual perception is four columns of five dots rather than five rows of four dots.

- **Continuation**: Elements are seen as belonging to each other if they appears to be a continuation of the direction at previous elements.

**Continuity**

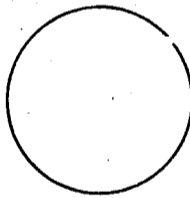


Fig. 3.9

## BRAND IMITATION

Fig. 3.9 is usually perceived as a circle rather than a broken circle. Our need for good form is so great that we may even supply elements in order to achieve closure, to perceive a meaningful whole.

- **Common fate:** Elements that move in the same direction are seen as belonging to each other (Robertson, Zielenski and Ward 1985).

## Common Fate

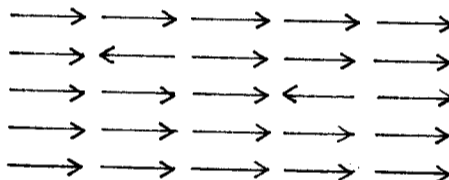


Fig. 3.10

In Fig. 3.10, the usual perception is that all the arrows are moving in the forward direction although few are in the opposite direction also.

Gestalt psychology explains why objects can be detailed differently but still look the observer. There are many cases of brand imitation where no one feature of the object is the same to the same, but all features are similar. Examples of infringement cases involving Gestalt are found in toys, handguns, and greeting cards.

## BALANCE THEORY

Balance theory comes from social psychology and the study of attitude formation. It postulates that individuals seek information that is consistent with their needs, interests and attitudes and avoid information that is not. This theory provides a rationale for cases involving unauthorized use or association of a successful trademark. The underlying idea of Balance Theory to explain why unauthorized association with a successful brand takes place. Marketers want customers to have a very positive attitude towards the goods and services that they are selling. When consumers have a positive attitude it is likely that positive behaviour in the form of purchases will follow.

Getting customers to have a positive attitude towards their product or service is a major task for marketers. While there are several complex, time-consuming and expensive ways to build positive attitudes based on the creation of good products and images, a very simple way is to associate the good with an object that consumers already have a very positive attitude toward. This implies the use of Balance Theory.

Balance Theory was developed by Fritz Heider in 1946 to explain how individuals cope with their environment. The basic premise is that people seek to balance their cognitive and affective states. In other words people want their attitude and feelings to be consistent with their objective thoughts and beliefs. This can be understood from the Fig. 3.11. In the figure the link between the person (P) and the attitude object (O) is the attitude in question. The attitude is represented solely by its valence, either positive (+) or negative (-).

<b>Weber's Law</b>	
$\frac{I}{VI} = K$	Where
VI = the smallest increase in stimulus intensity that	
will be just noticeable to the person (i. n. d.)	
I = the intensity of the stimulus before the increase.	
K = the constant increase or decrease necessary for	
the stimulus to be noticed.	

Box 3.1

The main point of Weber's law is that the ratios, not the absolute differences are important in describing the least perceptible differences in sensory discrimination. The differential threshold varies not only with the sensitivity of the receptor and the type of stimuli but also with the absolute intensity of the stimuli being compared. The size of the least detectable change or increment in intensity is a function of the initial intensity; that is the stronger the stimulus, the greater the differences needs to be (Britt 1975).

The use of Weber's law in the selling of goods is important. Manufacturers and marketers endeavour to determine the relevant just noticeable difference for their products for two reasons: first, so that reductions in product size, increases in product price, or changes in packaging are not readily discernible to the public; and second so that product improvements are readily discernible to the public (Schiffman and Kanuk 1993). The need to update existing packaging without losing the ready recognition of consumers to the package involves a number of small changes, each carefully designed to fall below the just noticeable differences, so that consumers will not perceive the differences. For example Lux Soap, Britannia Biscuits and Fair and Lovely Cream have all gone through many package changes over the years to update their image. Brand imitators may also design their package to be just below the noticeable difference level to the original so that differences are not readily noticed.

Weber's law can also be heavily influenced by context. For example, with respect to disclaimers, contrast is particularly effective in facilitating perception. Contrasts in size, form, colour and brightness are well known to be effective in altering Just Noticeable Difference levels (Jnd). Weber's law is also important in determining the size of warning labels or disclaimers in the context of advertisements or package sizes. The print and size of the warning or disclaimer must be proportional and relative to its context.

### Perceptions may be Biased

The perception of the existence of brand imitation is often debated. Usually the accused of imitation denies it, while the accuser is certain of the actual intent to imitate. To understand why these differing viewpoints of the same stimulus are so rooted, following information on the interpretation of perceptions is necessary:

**1. Perception are Selective.** Perceptions are best regarded as interpretations made in the light of previous experience. This interpretation occurs unconsciously and the existence of this step is apt to be denied, it instinctively places great reliance on the validity and directness of perceptions. However, a lifetime of previous experience must influence what one perceives. Our perceptions then are not always valid and they are not the direct appreciation of the environment; they are interpretations of sensory messages and this has important consequences. For instance, two people will often give different reports when they witness the same scene, not because one is a liar, unobservant or crazy but simply because past experiences of the two people are different and their interpretations in the light of their experiences lead to different results. They genuinely have different perceptions of the scene. One need not cease to accept

information and to the consumer's goals associated with the processing of the stimulus or information in question. In most cases of product choice, the goals are to recognize and choose, rather than examine and evaluate.

The fleeting aspect of attention is detailed by Jajszewski (1991). The first look at a stimulus (i.e., the first 200 milliseconds) is characterized by a non-fixation, indicative of a holistic analysis of the available information. During this pre-attention state, decisions are made about where to look (fixate) first. A decision of where to look involves a comparison of potential benefits associated with an additional fixation to the cost of being "temporarily blind" while engaged in the movement to that area. In many cases, assessing the potential benefits associated with the next fixation may be nothing more than assessing the density or uniqueness of information in that area.

The resulting pattern of looking or directions are highly dependent on the viewer's processing goals. Greater variability can occur when an individual is asked to view a picture for seven different purposes, as seven unique scan patterns will emerge, few of them comparable to those used by others (Jajszewski, 1991). In some ways this notion of goals is related to the idea of selective attention. The individual's processing capacity, in the short term, is limited in some central mechanism. This mechanism is associated with consciousness and controlled processing, and it delimits divided attention (Johnson and Dark, 1986). Selective attention therefore refers to the differential processing of simultaneous sources of information. Research on early selective attention show that sensory selection has consistently proved to be more accurate and less effortful than semantic selection.

It was very simply shown by Stroop (1935) in his famous colour and word experiments. It is easier for a person to identify the word red when it is in red lettering than in blue lettering. An example applied to marketing would be the identification of a label. If the traditional and original label were blue in colour with the brand name in red, the identification would be first of the colours-a sensory cue-and then second of the printed word or semantic cue. An imitator brand using the same colours but a different brand name might easily be misidentified as the first brand due to the superior selection of sensory cues, such as colour, over semantic cues such as brand name.

The same may be said for shape, as among the sensory cues, by which attention can be guided, spatial cues seem to be especially effective. Stimuli outside the spatial focus of attention undergo little or no semantic processing and stimulus processing outside the attentional spotlight is restricted mainly to simply physical features (Johnson and Dark, 1986). Therefore the individual narrowly focuses attention and does it as simply as possible. These are some of the reasons that consumer's mistake or confuse imitators for originals, both initially and after brand choice.

### Perception and Weber's Law

Weber's law states that in any given kind of perceiving, equal relative (not absolute) differences are perceptible. Weber's law is a description of the "just noticeable difference" (jnd) or differential threshold level that can be perceived by an individual. This is the minimum difference in a stimulus that will be noticed by the individual or the minimum differences between stimuli that will be noticed. The quantification and expression of this ratio is shown in Box 3.1.

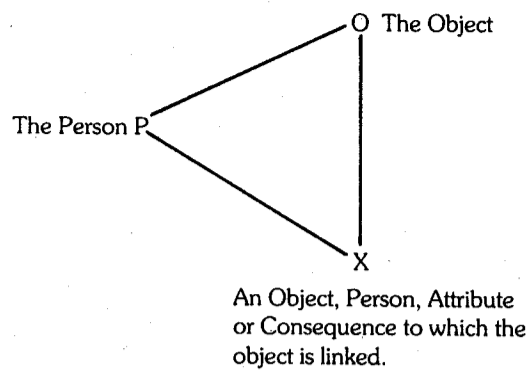
**Heider's Balance Theory**

Fig. 3.11

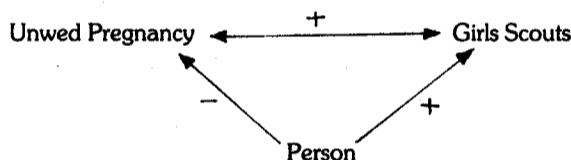
The link between O and X represents an association (+) or disassociation (-) between the attitude object and some related object, broadly construed to include people, attributes or consequences. According to Heider, the valence of the attitude between the person and the first object (P - O) can be predicated on the basis of the valences attached to the person and the second object (P - X) and the links between the two objects (O - X links). Because the individual is motivated to achieve a balanced state, the P - O valence will be determined by the algebraic multiplication of the two valences. For example, if Shahrukh Khan, the movie and television personality, is liked by a majority of consumers, they will hold a positive attitude (+) toward him. When he endorses Pepsi communications that leads to a positive connection (+) between Shahrukh Khan and Pepsi. The prediction is that the consumer will like Pepsi communications (+) and hence will be motivated to purchase Pepsi. In doing so, the consumer maintains a balanced state.

Balance Theory also explains why successful companies bring lawsuits against other companies that use their property unlawfully or in bad taste. Unauthorized use of a trade-mark to associate with a lesser object or a negatively perceived object can bring harm to the original through a decrease in the consumers attitudes toward the original. The negative perception "rubs off" on the original's image. In *Girl Scouts of the United States vs. Personality Posters Mfg. Co. (1969)*, the Girl Scouts of America tried to enjoin a company that was manufacturing and selling posters of visibly pregnant girls in Girl Scout uniform, with the headline, "Be prepared". The association of "pure Girl Scouts" (+) with unwed mother (-) would lead to an unbalanced (-) state, and perhaps harm the reputation of the Girl Scouts (Fig. 3.12). This is due to the pairing of Girl Scouts with unwed mothers by association. The individual has a constant (-) association to unwed mothers. To keep balanced, the previous positive sign to Girl Scouts changes to a negative sign. In this way tension is reduced because the overall state returns to positive (negative  $\times$  negative = positive).

## CHANGING IMAGE AND ATTITUDES

**Prior Attitude**

*Person stores images as unrelated in their mind.*

**Pairing****Result**

*Person in an unbalanced state and strives for balance.*

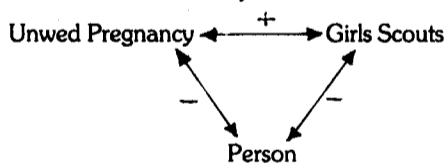


Fig. 3.12

Thus, the unauthorized use of someone else's trademark or trade dress is done to imply an association that should help in building a positive attitude about the infringer's product.

**CASES OF IMITATION IN THE MARKETPLACE**

There are literally hundreds, if not thousands, of cases of passing off to be found in legal libraries. The number of cases seems to be growing exponentially over the years as brand imitation is seen by many to be a very effective means of competition. While infringement of competing brands is the most obvious cause of legal action, the cases of related or unrelated products that led to consumer confusion is of utmost interest to those who are thinking about the extension of their brand equity.

**I. Name Similarity**

The importance of brand name in affecting consumer evaluation or choice cannot be overstated (Dodds, Monroe and Grewal 1991). Brand name is the single most used cue, after price, in determining consumer choice and evaluation. This is probably why most of the confusion in the marketplace is brought on by competitors focusing their confusion tactics on the name they use to label their products. The similarity of name can be between competing brands, between related product categories or even between unrelated product categories.



Cases of Imitation
<p>NAME SIMILARITY</p> <p><b>Competing Brands</b></p> <p>(a) Same Name</p> <p>(b) Similar Name</p> <p>(c) Partial Name</p> <p><b>Related Products</b></p> <p>(a) Same Name</p> <p><b>Unrelated Products</b></p> <p>(a) Same Name</p> <p>CONFUSION AND SIMILAR SHAPES</p> <p><b>The Product as Shape</b></p> <p><b>Consumer Packages as Shape</b></p> <p>CONFUSION AND SYMBOLS</p> <p><b>Tags as Symbols</b></p> <p>COLOUR</p> <p><b>Competing Brands</b></p>

Box 3.2

### (i) Competing Brands

(a) **Same Name.** It is seen that confusion over brand names started the history of passing-off litigation. In *Thomson vs. Winchester* (1837), Thomson sold certain medicines of his own preparation under the name "Thomsonian Medicines". Winchester then began to sell inferior medicines under the same name. In this early case, the court recognized that there was no exclusive right to the name if it had become generic and descriptive of a class of medicines, even though a party may be damaged by the inferiority of the medicines sold under the name. Unfortunately for Thomson, the law paid little attention to the perceptions of the consumer on this issue, or the reputation of Thomson medicines, in deciding that Winchester's actions were not illegal. Consumers and original producers were not protected and the way was clear for copy artists to benefit from name similarity.

Another example involved the sale of lead pencils by two brothers, *Faber vs. Faber* (1867). Originally A.W. Faber created and sold lead pencils with great success. His brother, realizing this success, also started to produce and sell pencils with his name, John H. Faber, stenciled on the pencil. There is no information on the quality level of John Faber's pencils in relation to those of his brother, but that did not seem to matter. The court ruled that John Faber was entitled to use his own name without fraud, despite the fact that it was his brother who created the market for Faber lead pencils.

In a case between, *Levi Strauss vs. Delhi-based Co.* (2001) the high court pointed out that the goodwill and reputation of the multinational company would suffer if goods of local companies were passed-off as those of the later. Levi-Strauss, an US-based MNC, is the registered proprietor of the trademark (TM) "Levi's" in respect to readymade garments and cloth, including footwear and headwear.

The Delhi-based Company was restrained from manufacturing and marketing footwear and related accessories bearing the trademark Levi's.

In another similar case, S. Kumars Nationwide, formerly S. Kumars Synfabs, was forced to launch a new ready-to-wear brand, 'Tamariind', in the wake of a copyright infringement rights case brought against it by a little-known Bangalore-based retail store.

S. Kumars had launched its first readymade brand 'Cinnamon' in Sept. 2001. Subsequently, the Bangalore store took S. Kumars to court claiming it was the true owner of the Cinnamon brand.

**(b) Similar Name.** The case involving similar brand names in the market is American Cyanamid Co. *vs.* United States Rubber Co. (1966) and the sale of Cygon versus Phygon. The products were pesticides recommended for use on plants such as apple trees, azaleas and roses. Both brands were agricultural chemicals sold mainly to farmers through the same channels of distribution. Because both brands do exactly the same job, the court concluded that the similar sounding names could easily be mistaken by either the retailer or the consumer. Therefore, American Cyanamid should sell its product under a name other than Cygon.

In Cadila Laboratories Ltd. *vs.* Dabur India Ltd. (1997, PTR 72) case, the plaintiff had coined, invented and was registered owner of the mark MEXATE for various types of cancer medicines. The plaintiff alleged that the defendants trademark ZEXATE was deceptively similar to that of the plaintiff's mark. Both the medicines were scheduled H drugs used in the treatment of cancer. According to the plaintiff, the trademark 'MEXATE' was being extensively used by the plaintiff since, as far back as in August 1991. It was stated that the plaintiff received information around January, 1996 that the defendant has introduced, in the market, a product under the band name 'ZEXATE' and the only difference between the plaintiffs registered trademark 'ZEXATE' was the letter 'M' replaced by the letter 'Z'. The plaintiff pleaded that the defendant had adopted 'Zexate' only to take advantage of the goodwill and reputation of the plaintiffs product 'Mexate' which had acquired a reputation in the market. The plaintiff further submitted that the defendants trademark is phonetically, visually and structurally identical to the plaintiffs registered trademark 'Maxate' and use of the same by the defendant was violation of the statutory rights which exists in favour of the plaintiffs.

The defendants contended that both the products were used for the treatment of cancer and a physician prescribed the said medicinal preparation only after careful examination of the patient and after conducting series of medical tests. The said medicine being scheduled "M" was sold by qualified dispensing chemists/ druggists on production of a prescription of a physician. Both the products of the plaintiff and defendant could not be expected to be sold over the counter, as it was a specialised drug for treatment of cancer.

The plaintiff prayed for an interim injunction. The court after considering the overall position of the plaintiff and defendant refused to grant interim injunction.

In another case (Terbuline T.M., 1990, R.P.C. 21 B.O.T.), Astra Pharmaceuticals applied for registration of the trademark TERBULINE in respect of pharmaceutical preparations. The registrar refused the application on the ground of conflict with registered trademarks TERBOLAN and TURBALIN for similar goods in the name of different parties.

**(c) Partial Names.** It is also deemed that only partial redundancy of names is enough to establish confusion for competing brands. (Maidenform Inc. *vs.* Bestforms Foundation Inc. 1969). Maidenform originally had a line of dream bras, including Day Dreams, Dream liners and Dream-Aire. Bestform subsequently launched a brand named Teen-Dream. Discussion centred on the common word "dream". The court held that there was likely to be confusion in the consumer's mind.

Another example involved the case between Time Warner Entertainment Company and N.K. Das (Time Warner Entertainment Company *vs.* N.K. Das, 1993 PTC 453). There was a joint venture agreement between the plaintiff and the defendant. Later on the agreement failed. The defendant started cable network under the name of CBO/CABLE BOX OFFICE. The plaintiffs were running business under trade name HBO/HOME BOX OFFICE. The plaintiff sought injunction claiming that the trademark of the defendant was deceptively similar to that of the plaintiff. The plaintiff also sought punishment injunction against the defendant. The plaintiff, Time Warner Entertainment Company, instituted a suit, seeking permanent injunction against the defendants restraining them from conducting their television services under the name, mark, or logo CBO/CABLE BOX OFFICE or under any name or style which is deceptively similar to the name mark or logo of the plaintiff, called HBO/Home Box Office.

The plaintiff was the owner of a division Home Box Office for the premium Television Programming with the logo called HBO. HBO operates the world's oldest and largest cable television channel under the

trademark HBO/HOME BOX OFFICE in use since September 1972. The plaintiff pleaded that HBO/ Home Box Office played a pioneering role in the cable television business and operates in 96 countries. The plaintiff had applied for registration in the year 1994 for the trademarks HBO. The representatives of the Plaintiff Company had visited India on several occasions and discussions were held with different representatives of the trade including the defendants. Widespread publicity was given to the joint venture between them. However, the joint venture project could not take off and failed to materialise as the defendants failed to come up with any concrete business plan.

In March 1996, the Time Warner Entertainment Company came to learn that the defendant proposed to launch a cable Television Service using the name CBO and/or CABLE BOX OFFICE. The plaintiff instituted a suit and grant of temporary injunction was sought, restraining the defendants from advertising, representing or conducting their television service in relation to its proposed programming service. The court, by way of an *ad interim* injunction restrained the defendants from advertising and conducting television service. The court held that the plaintiff had a *prima facie* case and shall suffer irreparable loss if interlocutory injunction was not granted. The injunction was confirmed later on.

## (ii) Related Products

The extension of brand names to other product categories or brand extensions by licensing etc. has increased the opportunity for confusion among consumers.

(a) **Same Name.** In *Union Carbide Corp. vs. Ever-Ready Inc.* (1976), the related products were batteries and light bulbs. Union Carbide produced and advertised an extensive line of electric batteries, flashlights and miniature bulbs for automobile and marine use. Since 1966, sales of these goods under the name of Eveready products have been in excess of 100 million dollars a year. In 1969 the defendant commenced importing miniature lamp bulbs having the term "Ever-Ready" stamped on their base. These bulbs were sold in blister packages displaying the name "Ever-Ready" in a four-sided logo and the package indicated use in high-density lamps. Although the products were not exactly the same, the two lines were very closely related. The court originally ruled for the defendant. However, on appeal, the judgement was reversed by a higher court. The higher court gave weight to a consumer survey that showed that 55 to 60 percent of consumers were confused about the source of the products.

## (iii) Unrelated Products

The degree to which two products categories are unrelated may not be obvious, or there may not be agreement on this issue. The degree of relatedness of the two products is perhaps a matter of judgement by the courts; how widely the products are used by the public and the length of time the products are in use. The question of the consumer's preceptions of relatedness of the product category is seldom asked in surveys for court cases; rather, the judge is left to decide this issue.

A manufacture of vitamins appropriated the name of V-8, the vegetable juice company protected the brand name of V-8, but no research was presented as to the relatedness of vitamins and juice. The reasoning of the court was that consumers might mistakenly infer a relationship between vegetable juice and vitamins. The court judged vitamins and juice to be related product categories. However, in a case where the two products were scotch whiskey and walking shoes (*John Walker & Sons Ltd. vs. Modern Shoe Co.*, 1954) it was held that purchasers of shoes would not conclude that the whiskey marketer had started marketing shoes (Stern and Eovalidi, 1984). The case was that the Modern Shoe Co. had named a shoe "Johnny Walker". The whiskey distiller felt that the Shoe Company had infringed on the name of its scotch.

(a) **Same Name.** The difficulty for courts in seeing the possibility for consumer confusion with unrelated product categories, despite identical distinctive names and established confusion in the minds of the consumers is well documented.

In *Lego Australia Pty. Ltd. vs. Paul's (Merchants) Pty.Ltd.* (1982), the defendant sold irrigation equipment bearing the name "Lego" in Australia. The plaintiff had sold Lego children's building block toys in Australia since 1978, and Lego toys had been marketed in Australia since 1962. Lego toys have been

manufactured since 1934 in other countries. The Lego irrigation equipment and been manufactured in Israel since 1929 and distributed in Australia since 1974. The name Lego was adopted by Lego M. Lemelstrich Ltd. independently and apparently without any wrongful intent. It was a combination of the first letters of the names of the founders of the business. The building block name was derived in Denmark in 1934 from the Danish words "Leg Godt", which mean play well.

A significant factor in the case was that both Legos were made of colourful plastic. Several witness said they had assumed that the irrigation equipment was made by the plaintiff because of the name Lego, because it was predominantly plastic and because companies appear to diversify. Since many households with children own building blocks that are purchased by parents, the issue was that parents would closely identify the children's toy company with the irrigation equipment company.

A survey conducted by the plaintiff suggested that the name Lego was well known as applied to the Lego toys and was not well known as being applicable to any other products. Therefore it would be possible to find consumers who believed that any product labelled lego was made by the toy company. The court concluded that companies might and sometimes do expand the range of products they produce. However, that in and of itself cannot warrant a conclusion that a particular company has done so and even though consumers made unwarranted assumptions or had misconceptions, that was the fault of the consumer, not the company. The judgement was for the defendant.

The same issue, with the same arguments, was brought to court in England (*Lego System A/S vs. Lego M. Lemelstrich* 1983). This time the judgement was for the plaintiff despite weaker consumer evidence than found in the Australian case. This ruling shows the overwhelming influence the judge and also the culture, may have in cases of passing-off.

In *Tata Sons Ltd. vs. Ramadasoft* (2001), the court in an ex-parte order barred the Hyderabad-based software firm, Ramadasoft, from using a series of domain names with a trademark of corporate giant, Tata Sons Ltd.

The court granted permanent injunction in favour of Tata Sons Ltd. saying "..... It is now settled law that with the advent of modern technology, particularly relating to cyberspace, domain names or interest site are entitled to protection as a trademark because they are more than a mere address."

"The rendering of Internet services is also entitled to protection in the same way as goods and services are and trade mark law applies to the activities on Internet," the court said.

The court further said : "By its affidavits of evidence and documents exhibited, Tata Sons Ltd. has proved the averments made by the Hyderabad-based firm, and accordingly Ramadasoft and its agents are permanently restrained from using domain names containing the word 'Tata' or any other mark and name identical or deceptively similar to the corporate giant's on the internet.

"An order of permanent injunction is passed against Ramadasoft restraining it for operating any business in any goods or services under any domain names containing the word, 'Tata', the court said.

Some companies take the transfer of established brand names to unrelated product categories very seriously. For example, on March 20th, 2001 an advertisement was released by Torrent Tea (India) Ltd. for appointment of C & FA/Super stockists for packet/loose tea. Immediately, the Torrent Pharmaceutical Ltd., responded (29th March, 2001) with an advertisement that Torrent Tea (India) Ltd., has no connection with it. As per advertisement Torrent Pharmaceuticals Ltd. are engaged in business of Medicinal and Pharmaceutical preparations and are not carrying on any business in Tea. Therefore, public at large should not be confused or deceived that the Torrent Tea (India) Ltd. is a member of Torrent Group of companies, Ahmedabad.

Further the manufacturers, dealers, distributors, stockists and exporters of Torrent Tea (India) Ltd. were warned that any unauthorised use of trademark 'TORRENT' in any manner would constitute, passing-off and render the imitators liable to civil and/or criminal proceedings in a court of law.

Protecting one's brand name from use in unrelated product categories serves two purposes. First, if the brand name is used to label an unrelated product by another manufacturer and that product is of inferior quality, the poor image may reflect on the original product. Manufacturers do not want to risk their brand name being attached to inferior product, no matter how far removed from the original product class. Second, protecting one's name in unrelated markets protects future options, because the manufacturer may later want to extend the name to different product categories. Perhaps the more frequently brands extend to unrelated product categories, the more likely court will grant protection of their trademark.

## II. Confusion and Similar Shapes

Sometimes consumers identify brands or products not by their brand name but by their shape. Shape can be found in law under the expression of "distinguishing guise". It can be the shape of wares, their containers, their mode of wrapping or packaging wares that is used for the purpose of distinguishing wares or services from others. The shape itself may be desirable or the shape may represent to the customer the quality of the product through identification of the brand. The shape of the article may be protected by the Design Act, 1911 (Discussed in Chapter 4). The shape is meaningful to the consumer. Shape may be the initial cue to identification of the desired product. The identification by shape and design takes place in both the consumer and industrial marketplace. If a product obtains commercial success and this is seen to be related to its design, competitors are quick to copy the design of the product, usually at a lower price. When a distinctive shape is developed to identify the brand, it is important for the producer to emphasize the shape in its advertising. By doing this, the consumer will be more cognizant of the shape than the brand name.

Manufacturers are eager to seek trademark protection of product shapes or configurations because this form of product differentiation may have four significant anti-competitive effects: First, it may permit the seller to acquire a control over price that he or she could not otherwise maintain. By differentiating the appearance and protecting the distinction, consumers will buy the product even though the quality level is not higher than that of a non-differentiated product. Second, shape aids quick identification of the brand for the consumer and thus simplifies the decision-making process. Third, shape adds to the cost of production and marketing by requiring expenditures for differentiation not related to the quality or actual needs of the product. Fourth, entry into an industry is made more expensive because of higher initial losses while the consumer learns to identify the product by a new shape.

**(i) The Product as Shape.** In *Ampro Food Products vs. Ashok Biscuit Works and Another*, (AIR 1973 AP 17) case, the appellants and respondents manufactured biscuits. The appellant's design was registered. The respondents biscuits also had an identical design embossed on them except that instead of letters "AP" (Which were embossed on the appellant's biscuits) letters "AB" appeared on the respondent's biscuits. The appellants filed a suit for injunction claiming that the respondent had committed piracy of his design. Pending disposal of the suit, temporary injunction was sought for.

It was held by the court that for an injunction based on registered design, the defence that the appellant's design was not new or original was not open to the respondent since no step has been taken for the cancellation of the registration of design.

Temporary injunction was issued by the court restraining the respondents from using the appellant's registered design and from selling biscuits bearing that design.

The identification of establishments by their distinctive shape or structure is quite common. Because the highways are so crowded, an instantly recognizable symbol of standards and quality can turn travellers and commuters into customers. A uniquely designed building can function as a trademark and convey relatively complex messages in a form of graphic shorthand.

The identification of the shape as a symbol of the establishment is exemplified by McDonald's golden arches, Tower Pizza, Holiday Inn, and Howard Johnson, to name a few. Just the sight of a pair of golden arches brings pictures of hamburgers and children to mind. Seeing a pair of golden arches that is not McDonald's would be a jarring and confusing experience to most people.

**(ii) Consumer Packages as Shape.** Shampoo bottles, perfume bottles, and deodorant bottles are but a few product categories where distinctively designed package shapes lead to distinctive brand identity. Manufacturers of perfume put great effort into linking the distinctive shape of the perfume bottle to the brand name. This has been a relatively successful and ethical practice over the years.

The success is perhaps due to the fact that perfume is a relatively expensive product that conveys a strong image and meaning to the consumer. This is in contrast to a product like shampoo. Shampoo brands may develop distinctively shaped bottles, but their bottles are readily copied by competitors. For e.g. Head & Shoulders is a brand that constantly suffers from imitation of the shape of the bottle.

One of the first cases involving the shape of perfume bottles was *Lucian Lelong Inc. vs. George W. Button Corp.* (1943). The plaintiff successfully protected its brand and shape of the bottle. Since then, the design of distinctive perfume bottles contributes to the multi-million dollar perfume business. Some consumers buy the perfume only for the bottle, which is seen as a collection piece.

In *Ravlon Inc. vs. Sarita Manufacturing Co.* (1997 PTC 394) case, plaintiff were owner and proprietor of registered trademark 'REVLON', 'CHARLIE' and 'INTIMATE' relating to cosmetics, perfumery and toiletries. The plaintiff sought restraint order against defendants for infringing the plaintiff's registered trade mark, as not only the containers and cans of the defendant look alike to that of the plaintiff's but they were also written exactly in the same style of lettering as that of the plaintiff. As per the court, the action of the defendants, *prima facie*, amounted to deception of the general public so as to pass-off their products as those of the plaintiff. The court restrained the defendant from manufacturing or selling perfumes, cosmetics and toiletry, under the trademark 'REVLON', 'INTIMATE' and 'CHARLIE' or any other mark deceptively similar to them.

Thus, the shape of the package as well as the shape of the brand are common cues used by consumers to identify brands. Changing the shape may have no impact on the concrete benefits derived from the product, but may be crucial in brand identification.

### (III) Confusion and Symbols

Similar symbols may cause confusion in the consumer's identification of the products in the market place. A symbol is usually something specifically associated with a name brand. The symbol may be used by the customer to differentiate between the brands. It is usually attached to the object and does not serve any purpose other than identification. In some cases the symbol is very small in relation to the object it represents.

**(i) Tags as Symbols.** An example to this is found in the manufacturing of clothing (*Levi Strauss vs. Blue Bell*, 1980). Since 1936, Levi-Strauss had used a small tab affixed to the exterior of its jeans at the hip pocket to identify them as Levi's. The company has also used this tab on other products it manufactures, such as shirts or jean jackets. Wrangler jeans, which had a significantly smaller share of the market, also started to put the same size tab on its casual garments. Wranglers' tabs were of different colours, such a red, black, brown, white, olive, yellow, pink, orange and green. Despite these different colours, in a consumer survey it was seen that Wrangler garments with the tab were identified as Levi's. The tab was therefore being used by the customer to identify the brand as Levi's, irrespective of its colour. It was the key evidence in the judgement for Levi's.

In *Rupa & Co. Ltd. and another vs. Dawn Mills Co. Ltd. and another*, (AIR 1998 Guj. 247) case, the high court held that the plaintiffs were owner of registered trademark in the form of label depicting figure of Sun at dawn with prominently displayed word 'Dawn' and subsidiary word hosiery beneath DAWN as well as words 'DAWN HOSIERY' *per se* since last over 40 years and were marketing their products under that name. Also the defendants were manufacturing and trading in the same field of hosiery for over 25 years, under the registered trade name RUPA. From the sample of offending hosiery products and cartons

in which the same were offered to buyers by the defendant shown to the court, it was clear that on labels attached to it word 'DON' was shown in prominence rather than its registered trademark 'RUPA'.

The court held that the use of word 'DON' by defendant *prima facie* infringed plaintiff's registered mark and the temporary injunction was granted.

#### (iv) Colour

Colour is an extremely important cue for identification. It takes less effort to identify a brand by its distinct colouring than by any other attribute. For e.g., the exclusive rights of Coca-Cola in the red and white colours did not happen overnight but rather with a hundred years of use and advertising.

Colour is now accorded trademark protection. As per the Section 2(1) (Zb) of Trade Marks Act, 1999, "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 (Trade Marks Act discussed in Chapter 4).

Colour in distinctive combinations or patterns can be critical to product or brand identification. There may be a problem in copyrighting certain colours but when colours are coupled with other factors like shape or name, it becomes easier to protect them. For e.g., if drugs of certain colour combinations can also be linked to a certain shape, they may be more distinctly identified.

The importance of the understanding of the role of colour by the marketing community can be explained with the following example. A Vancouver business wanted to sell tea to India, with a package similar to the leading local brand, Nabob. The name was changed from Nabob to Maharajah but all other aspects of the package were extremely similar or the same.

It was proposed by Nabob that the imitator could keep all aspects of the package same if the colour is changed from the copy-cat red to blue or green. The defendant, knowing the value of the colour initially refused but later on accepted to slightly lighten or darken the colour of the package from the original red. It clearly shows how squabbles over shade might result.

**(i) Competing Brands.** In *Kishore Zarda Factory & others vs. J.P. Tobacco House & others* (AIR 1999 Del. 32) case, the tin of chewing tobacco had not only similar colour scheme, but the writing style of the letters and selection of numerals and their selling were strikingly similar. The plaintiffs were in business since 1984 and defendants had launched their business in 1994. The tobacco-chewing purchasers are generally illiterate. The court restraining the defendants from using the tradename granted an interim injunction.

In another case between *Glaxo India vs. Welable Pharmaceuticals Ltd. and Akay Pharma Pvt. Ltd.* an ex parte injunction was granted against *Welable Pharmaceutical Ltd. and Akay Pharma Pvt. Ltd.* by the Delhi High Court restraining them from using similar colour scheme, get-up and layout as that of *Glaxo India's* in respect of *Tetramisole soluble powder*.

*Glaxo*, was producing *Nilverm* having chemical composition of *tetramisole hydrochloride*. The characteristic features of the *Nilverm* were that it had the base of the tin in white colour and with two horizontal green bands of equal dimension on the top. The name of the chemical composition, *Tetramisole* was written in green in a characteristic style. Five different animals heads were shown in circles in a green background.

The said tin container was used by *Glaxo India* for a long time and it had over the years acquired tremendous reputation among the general public. *Glaxo*, was having an exclusive right over the designs of its container and also a copyright over the size and colour in which the directions for use were written.

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## CHAPTER 4

# LAWS GOVERNING IMITATION

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*A cause is like champagne and high heels — one must be prepared to suffer for it.*

— *Arnold Bennett*  
(1867-1931)

## LAWS

### Introduction

“Too strong can mean too bad!” If a brand name becomes so successful and dominant that it is the only name consumers remember for a given product, a dangerous thing can happen. The name becomes accepted as a part of the language and the protection for it can be lost. Famous names that have lost their trademarks are names like Nylon, Aspirin, Cellophane and Escalator. Others that came dangerously close are Jell-O, Scotch, Xerox, Dalda and Formica.

Many of the common forms of protection for brands and brand names are based on laws. Therefore, it is essential to know about these laws, how they do and don't protect brands from being copied or stolen, and the technical interpretation of the legal words like infringement etc.

The more common problem is infringement of the intellectual property rights (IPR) of brands by creating very similar sounding or looking names or icons in order to trade on the brand equity of a well-known brand. Companies have taken a more aggressive stance toward safeguarding their intellectual property rights and have come to recognise that trademarks do more than simply distinguish their offerings from those of competitors. Cohen (1986) notes that a trademark does not protect a product, it protects a product's identification.

After liberalisation, a number of manufacturers have come on the scene. There is growth in commerce and this has resulted in the multiplication of products. The purchasers naturally wish to purchase the best goods but are confused between what is superior and what is inferior. Consumers are unable to decide what is original and what is imitated. Some of the main categories of packaged mass consumption consumer goods are facing the problems of counterfeits and pass-off.

Counterfeit and pass-off products pose a serious threat to health and safety. These consequences are more serious than loss of market share and revenue to the manufacturers of genuine products and cannot be ignored. Food articles that are of dubious quality are the most serious threat to the existence and well-being of all consumers. For example the story of the mustard oil adulteration in several parts of the country (India) in 1999, is one example.

The Bureau of Indian Standards (BIS) has specified the various maximum allowable concentration levels of bacterial count in various cosmetic products in cfu/ml (Cfu = Colony forming units). The maximum allowable bacterial count is 1000 cfu/ml for shampoos. Keeping in mind the unhygienic conditions of manufacture and poor quality of counterfeit/pass-off products, it is more likely that microbial counts of products are higher than the recommended standard. Therefore, the counterfeit products are definitely harmful to consumers.

Counterfeit/pass-off cosmetics may contain residues of industrial solvents and carcinogens, which may cause severe allergic reactions. Fake shampoos may cause excessive hair loss, cause reactions on the scalp, skins or eyes or can even weaken the immune system of consumers.

Use of counterfeit creams, balms, lotions or ingestion of fake medicines may lead to illnesses of various kinds, aggravate existing health problems and in the worst case may even lead to death. From the use of poor quality detergents, which are used by everybody to wash clothes, the consumers may suffer from ill effects such as rashes, infections or allergic reactions.

Thus, counterfeit and pass-off products infringe two of the consumer rights, namely

- the right to be protected against marketing of goods which are hazardous to life and property.
- the right to be informed about the quality, potency, purity and standard of the product against unfair trade practice.

Under the current legal system in India, there are a number of laws that empower consumers or consumer bodies or affected companies to take legal action against manufactures or sellers of counterfeit and pass-off products (Box 4.1).

<b>Laws Governing Imitation</b>
<ul style="list-style-type: none"> <li>● <i>Trademark Act</i></li> <li>● <i>Copyright Act.</i></li> <li>● <i>The Design Act.</i></li> <li>● <i>Indian Penal Code.</i></li> <li>● <i>Drugs and Cosmetics Act.</i></li> <li>● <i>The Prevention of Food Adulteration Act.</i></li> <li>● <i>Consumer Protection Act.</i></li> </ul>

**Box 4.1**

## TRADE MARKS ACT

### Introduction

A consumer is duped if he buys a commodity presuming it to have originated from a certain identified source when actually it is not and later he finds the commodity substandard. In the process, the reputation of the trader suffers if spurious goods are sold as those originating from him. The interests of both the consumer and the trader can be saved if some definite symbol, which marks out the origin of goods from a definite trade source, is attached with the goods emanating from such source. Such symbol is called a trademark.

### Definition — Trade Mark

A trade mark is — “a name, symbol or other device identifying a product, officially registered and legally restricted to the use of the owner or manufacturer”.

Trade marks are words, names, symbols, brands, devices, headings, labels, tickets, signatures, letters or numerals or any combination thereof, used or proposed to be used by manufactures of goods to identify and to distinguish their goods from goods manufactured and sold by others. A person who sells his goods under a particular trade mark acquires a sort of limited exclusive right to use the mark in relation to those goods.

For example, the trade mark 'Lakme' distinguishes the goods Lakme of Lever Company from those of say, the 'Revlon'. The word 'Revlon' is a separate trademark which distinguishes goods of Revlon.

TABLE 4.1

## Definitions of Trade Mark

S.No.	Definition	Reference
1.	A name or a symbol, which is put on a product to show that is, made by a particular producer. The symbol or name cannot be legally made by any other producer and the name or symbol cannot be legally used by any other producer.	Keshav S. Dhakad (The Economics Times July 29, 2000).
2.	"If properly used, trademarks are forever" (1982). A successful trademark can provide what Hunt, Muncy and Ray describe as an "ecological niche" for the competitive organisation (1981).	Sidney A. Diamond Former Commissioner of Patents and Trademarks.
3.	Any visible sign or device used by a business enterprise to identify its goods and distinguish them from those made or carried by others. Trademarks may be words or groups of words, letters, numerals, devices, names, the shape or other presentation of products or their packages, colour combinations with signs, combinations of colours, and combinations of any of the enumerated signs.	The New Encyclopaedia Britannica
4.	The trademark is a sign, mark, symbol, word or words which indicate the origin and ownership of an article as distinguished from the quality and which others have not the equal right to employ for the same.	Prof. Copeland.
5.	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.	Section 2(1)(zb) of Trade Marks Act, 1999.
6.	Well known trade mark — a mark in relation to any goods or services which has become so to the substantial segment which uses such goods or receives such 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.	The Trade Marks Act, 1999.

Thus, as the brand is a word, name, design, sign or a combination of all, the trademark is a registered word or name or design or the combination of all. Hence, the point of difference is the registration under the Trade Marks Act which terms trademark a legal name.

The duplication or copying of brand is simple, as it is not a legal term. On the contrary, it is quite difficult to copy the trade mark as legal actions can be taken against copying or duplication. The scope of brand is limited as it becomes a part of the trademark but the scope of trademark is vast. At the outset, we fix the brand, get it registered and the moment the registration process is over, it is called the trade mark. Thus, all the trademarks are brands but all the brands are not the trade marks.

A rather long overdue provision in the Indian trademark laws was the statutory protection to famous trade marks. The new Trade Marks Act, 1999 introduces this provision, on the same lines as in many other developed countries. This was essential as a trademark owner usually exhausts a considerable amount of labour, capital and time before his mark becomes a common household name. The new trade mark law examines the following factors before elevating the status of a trademark to a "Well-known" trade mark.

- Knowledge and recognition of a trademark in the relevant section of the public, including knowledge through promotion.
- Duration, extent and geographical area of use and promotion of that trade mark.
- Registrations in other countries, to the extent that they reflect the use or recognition of that trademark.
- The record of the successful enforcement of the rights in the trademark, leading to recognition of that trademark by a court or Registrar as well-known.





Additionally, the following privileges are also attached to well-known trade marks.

- Whether a trademark has been used or registered or applied for in India, *inter alia*, will not act as a condition precedent for determination of whether a mark is a well-known trademark or not.
- Every new trademark application for the registration of a trade mark will be scrutinized to ascertain that it does not violate rights of any of the well-known trademarks.
- A mark shall not be refused registration, if, before the date of filling of the application, it is regarded as a well-known trade mark.

The apparent advantages, which will accrue from this protection is that age-old Indian brands such as Tata, Godrej, Bajaj, Dabur *et al.* can now be protected as "well known trade marks". The enforcement of well-known trade marks would become easy and quick in the courts and with the other enforcement agencies, which would, in the long run, bring down the level of counterfeiting of famous trademarks, in India as well as abroad. Another advantage is that for brand valuation, there would now be different parameters for well-known marks, which would be reflected in their share prices. The focus of industries would shift from protecting tangible assets to intangible assets like brands and trademarks and this would further build customer confidence *vis-a-vis* goods bearing well-known trade marks.

## BRAND IMITATION

**TABLE 4.2**  
**Trade Mark**

A word	<b>KINETIC</b>
A device (Symbol/sign/picture/logo)	
<p>Device is a legal term for a picture or shape or logo or symbol. It must be simple in style and capable of being described in a few words. Device marks are mostly used for ordinary consumer goods like cosmetics, textiles, household articles and articles of food.</p>	
Numeral	<b>400</b>
Initials or alphabets	'ICI', 'IBM', 'K'
Slogans	"Have a Break" "Have a Kit-Kat"
Trade Names	CMC LIMITED
Trading style	CMC Limited 
Or any permutation and combination of the above	
Label	



**Definition of Mark**

Section 2(1) (m) of Trade Marks Act, 1999 defines a mark as:

'Mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

For example, the numerals '555' attached to a washing powder is its trademark.

A person who sells his goods under a particular trademark acquires limited exclusive right to use of the mark in relation to those goods.

A trademark may be registered or unregistered. An unregistered trademark is called common law mark.

A trademark when registered gets a stable existence. A registered trade mark can be in relation not only to its existing use but also for a proposed use.

**The Functions of a Trade Mark**

A trade mark serves the purpose of identifying the source of origin of goods. Trade Mark performs the following four functions:

- It identifies the product and its origin. For example, the trademark 'Brook Bond' identifies tea originating from the Company manufacturing tea and marketing it under that mark.
- It guarantees its quality. The quality of tea sold in the packs marked Brook Bond Tea would be similar but different from tea labelled with mark Taj Mahal.
- It advertises the product. The trade mark represents the product. The trademark 'Sony' is associated with electronic items. The trade mark SONY rings bell of particular quality of particular class of goods. It thus advertises the product while distinguishing it from products of Sony's competitors.
- It creates an image of the product in the minds of the public particularly consumers or the prospective consumers of such goods.

The mark 'M' which stands for the food items originating from the American fast food chain McDONALD creates an image and reputation for food items offered by it for sale in the market.

**Need and Emergence of Trade Marks Law**

The marks associated with goods come to acquire a reputation and goodwill around them. Before the enactment of the Trade Marks Law, the trade marks used to be called common law marks. The Common Law Marks could not be registered, as there was no law under which it could be done.

The owner of a common law mark had to protect his mark against acts of infringement or passing off of his mark by initiating common law proceedings. Such proceedings had to be set in motion each time an infringement occurred. Also such proceedings could be launched only when an infringer had actually used the mark. Such proceedings used to be time taking and onerous. That brought in the need for a special legislation.

Enactment of the Trade and Merchandise Marks Act, 1958 brought into existence a system of registration of trademarks which gave statutory recognition to proprietorship of trade marks and defined the rights conferred by such registration and prescribed remedies in respect of infringement of those rights.

**Essentials of a Trade Mark**

A trademark should be distinctive (Also discussed in Registration of Trade marks).

- **Distinctiveness of the Trade Mark.** A trademark would be considered a good trademark when it is distinctive.

In the case of *Imperial Tobacco vs. Registrar, Trade Marks* AIR 1977 Cal. 413, the word distinctiveness was held to be some quality in the trademark which earmarked the goods marked as distinct from those of other products or such goods.

### Features of Distinctiveness

**I. Distinctiveness may be class dependent.** What is distinctive in relation to one class of goods may not be so in relation to another class of goods. The trademark may be united wholly to one or more specified colours and this colour combination may become the distinctive character of the particular mark.

**II. Distinctiveness may be inherent or acquired.** Inherent distinctiveness means that the mark or get up is distinct in itself from everything else and no one can justifiably claim the right to use it. For instance, marks in the shape of an invented word like 'Rin'.

*Acquired distinctiveness means:*

- Distinctiveness through use. Most of the trademarks acquire distinctiveness through use. The trademarks Yashica, Hawkins, Surf and Luxor have acquired distinctiveness through use and also the distinctiveness due to the inherent quality of their being invented words.
- The trade mark should preferably be an invented word. In fact, the best trade marks are invented words.
- The trade mark, if a word or name should be easy to pronounce and remember. For instance, 'Bata' for shoes; 'Zen' for car, 'SONY' for electronics, 'FORD' for car, 'Panchranga' for pickles etc.
- In case of a device mark, the device should be capable of being described by a single word.
- It must be easy to spell correctly and write legibly.
- It should not be descriptive but may be suggestive of the quality of goods. For example, a mark A-I would generally suggest superior quality. Avon (A-I) cycles for instance.
- It should be short. For instance 'Tick', 'Flex', 'Ben', 'Rin'.
- It should appeal to the eye as well as the ear.
- It should satisfy the requirement of registration.
- It should not belong to the class of marks prohibited for registration. For example, a mark contrary to law for the time being in force or a mark prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950.

### Trade Mark Law and Protection of Trade Mark

The Trade Mark Law in India is contained in the provisions of the Trade Marks Act, 1999 (47 of 1999). The earlier Trade and Merchandise Marks Act, 1958 has been repealed. The 1958 Act with the extensive amendments, has become the 1999 Act.

After the Act is enacted by the legislature, rules thereunder are made by the Government to facilitate and regulate the implementation of the provisions of the Act. Rules made under an Act have the force of law. The rules have, however, to be consistent with the provisions of the Act.

**How a Trade Mark is protected?** To protect the registered Trade Mark, the following remedies can be resorted to:

- (i) Civil remedies,
- (ii) Criminal Proceedings,
- (iii) Administrative Remedies.

**(i) Civil Remedies.** When instances of infringement and passing off occur, the court of competent jurisdiction (court not lower than District Court) can be moved for grant of interlocutory injunction, Anton Pillar Orders, damages and account of profits (Discussed in the Copyright Act).

(ii) **Criminal Proceedings.** Complaint may be made against the person causing infringement.

Both the actions, under the civil law and criminal law can be initiated simultaneously. Under the civil law proceedings the plaintiff seeks reliefs for himself while under the criminal law proceedings the complainant seeks award of punishment to the infringer.

(iii) **Administrative Remedies.** Opposing the registration of a deceptively similar trademark when the Trade Mark Registry is in the process of considering the grant of a trademark, can protect the trademark. The Registry can also be moved for removal of a deceptively similar trademark if registered.

### **Service Marks**

Under the Trade and Merchandise Marks Act, 1958 service marks were not registrable. The 1999 Act, however, makes the service marks also registrable.

### **Collective Marks**

“Collective Mark” is defined in the 1999 Act as a trademark distinguishing the goods or services of members of an association of persons, which is the proprietor of the mark from those of others. The association of persons, however, includes partnership within the meaning of Indian Partnership Act, 1932.

### **Deceptively Similar Work**

The expression “deceptively similar” in relation to a mark has been defined as that which so nearly resembles the other mark as to be likely to deceive or cause confusion.

Section 2 of the 1999 Act lays down that any reference to “Trade Mark” shall include reference to “Collective Mark” or “Certification Trade Mark”.

### **Registration of Trade Marks**

**Registrar of Trade Marks.** The Registrar of Trade Marks is the authority responsible for registration of trade marks, setting opposition proceedings and rectification of the register. He is vested with wide ranging discretionary powers. He also has powers of a Civil Court in certain matters and certain residuary powers. The Registrar of Trade Marks can also review his own decision.

### **Register of Trade Marks**

The Register of Trade Marks is the official record of trademarks.

Section 6(1) of the Trade and Merchandise Marks Act, 1999 provides that for the purpose of this Act, a record called the Register of Trade Marks shall be kept at the Head Office of the Trade Marks Registry, wherein shall be entered all registered trade marks with the names, addresses and descriptions of the proprietors, notifications of assignments and transmission, names and addresses and such other matters as may be prescribed.

Section 6(6) further provides that there shall be kept at each branch office of the Trade Marks Registry, a copy of the Register and such other documents which may be notified by the Government in the *Official Gazette*.

Section 6(2) of the 1999 Act provides that it shall be lawful for the Registrar to keep the records wholly or partly in computer floppies, diskettes or in any other electronic form subject to such safeguards as has been prescribed.

Section 6(7) of the 1999 Act provides that the Register of Trade Marks, both Part A and Part B, enlisting at the commencement of 1999 Act shall be incorporated in and form part of the register under the 1999 Act.

**Classification of goods and services.** Section 7 of the 1999 Act provides that the Registrar shall classify goods and services in accordance with their international classification for registration of trade marks.

### Principles of Registration of Trade Marks

The trade mark law, had been evolved with the purpose of recognizing the proprietary right of a trader to use a mark for his goods.

There are certain fundamental principles, which form the basis of the Trade Mark law.

The same are listed below:

- A trader cannot claim absolute proprietary right on any word or symbol. The monopoly right conferred by the registration of a trade mark is clothed with certain restrictions to enable other traders to make *bonafide* use of such marks for trading or business purposes in certain circumstances.

Section 28(3) of the 1999 Act lays down that where two or more persons are registered proprietors of trademarks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not be deemed to have been acquired by anyone of those persons as against any other of those persons but each of those persons will have otherwise the same rights as against such other persons who have not been registered as users by way of permitted use as he would have if he were the sole registered proprietor.

- Descriptive words surnames and geographical names are not *prima facie* registrable. For example, the word 'Sharma' cannot be registered as a trademark for confectionery goods since it is a surname.
- The interest of the public is to be safeguarded. The guiding principle is that a trademark is not to be registered if its use will mislead the public about the origin of the goods they purchase or intend to purchase. Thus, a deceptively similar mark is not to be registered. Where a trader opposes the registration of a particular mark on the grounds that such a mark proposed to be used will cause passing off, such a mark would be denied registration. Section 11 of the 1999 Act, list out the marks, which are to be denied registration.
- The provision that one mark is to denote one origin is not absolute. There may be instances where two traders may have been using a similar mark in respect of goods over a period of time, each oblivious of the use of such mark by others. The trademark law recognises that such instances of honest concurrent use may occur in real life. Section 12 provides that such marks can be registered subject to suitable conditions and limitations.
- The life of a trade mark depends on its actual use. Section 47 of the Act provides that a trade mark may be removed from the Register on ground of non-use.
- A trade mark is a form of property, the proprietorship of the trademark is assignable and transmissible as in case of other forms of property.
- The property rights in a trade mark acquired by use are superior to similar rights obtained by registration under the Act. Prior users of trade marks are protected against any exercise of monopoly rights by the people having registered similar marks though later in time.
- The trade mark law is not coded with the aim of protecting the interest of the trader only. The interest of others too are safeguarded by giving them opportunity to file opposition to the registration of a trademark after it has been advertised in the Trade Mark Journal. And in certain circumstances even after the marks has been registered.

**Part 'A' And Part 'B' Registration.** The Trade and Merchandise Marks Act, 1958 provides for registration of a trademark either in Part A or in Part B. This concept of Part 'A' and 'B' has been omitted in the new Act of 1999. Thus, now there is only a single register with simplified procedure for registration and with equal rights.

## Refusal of Registration

**Absolute grounds for refusal of registration.** Section 9 of the 1999 Act lists the following grounds being absolute grounds for refusal of a trade mark:

- Such trade marks which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another.
- Trade marks which consist exclusively of such marks or indications which may serve in trade to designate the kind, quality, intended purpose, values, geographical origin or the time of production of the goods or rendering of services or other characteristics of the goods or services.
- Such trade marks, which consist exclusively of marks or indications which have become customary in the current language or in the *bonafide* or established practices of the trade.

However, a trade mark shall not be refused registration, if, before the date of application for registration, it has acquired a distinct character as a result of the use made of it or if it is already a well-known trade mark.

*A mark also shall not be registered as a trade mark if:*

- it is of such nature as to deceive the public or cause confusion.
- if it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or sections of citizens of India.
- if it comprises or contains scandalous or obscene matter.
- if its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950.

**Relative grounds for refusal of registration.** Section 11 of the 1999 Act lays down that a mark shall not be registered as trade mark if there is likelihood of confusion caused to the public including the likelihood of association with an earlier trade mark by virtue of its identity with the earlier trade mark and similarity of goods or services caused by the earlier trademark or by virtue of its similarity to an earlier trademark and identity or similarity of the goods or services caused by the earlier trade mark.

**Distinctiveness.** Distinctiveness has been understood as 'some quality in the trade mark, which earmarks the goods, so marked as distinct from those of other products or such goods'. The distinctiveness may be - (i) inherent; or (ii) acquired over a period of time.

The trade mark law is based on the premise that one good can have only one origin, just as one man has one mother. The trade mark serves as an identification of origin and distinguishes the marked product from those of the competitors that is why the element of 'distinctiveness' is so important.

**Distinctiveness does not give conclusive right to registration.** The distinctiveness, though a necessary condition for registration, is not by itself sufficient to qualify for registration. The applicant's chance of success in obtaining registration of a mark would largely depend upon whether other traders in the ordinary course of business and without any improper motive desire to use the same mark. This is the reason why words like 'India', 'Shimla' and 'Mysore' being geographical are un-registrable. 'Perfection' being laudatory expressions and 'Janta' Rasoi being common expressions would be unregistrable even if there is evidence of acquired distinctiveness. Where the inherent unsuitability of the mark is evident, no degree of distinctiveness can tilt the balance in favour of registration of the mark.

## Conditions for Registration of Trade Mark

A trademark shall not be registered unless it contains or consists of at least one of the following essential particulars, namely:

- The name of a company, individual or firm represented in a special or particular manner.
- The signature of the applicant for registration or some predecessor in his business.
- One or more invented words.

- One or more words having no direct reference to the character or quality of the goods and not being according to its ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India.
- Any other distinctive mark.

**Illustration— Words Found Invented**

- SOLIO for photographic paper. Eastman's application (1898) 15 RPC 476.
- BOVRIL for substance used as a food, a fancy word (Bovine refers to intestine). Bovril T.M., (1896) 13 RPC 382.
- SAVONOL for soaps derives from the French word 'Savon' meaning soap. Field *vs.* Wigel Sundicate, (1990) 17 RPC 266.
- WHISQUEUR for liquors containing whisky (coined by telescoping 'whisky' and 'liquor'). Hallgarten's Appln., (1949) 66 RPC 105. Similarly, Coffusa (Coffee + Infuser), Frumato (Fruity + Tomato), Glucoda (Glucose + Soda).
- KODAK for camera, Eastman *vs.* John Griffiths, (1898) 15 RPC 105.
- WASHERINE for a liquid preparation for laundry purposes. A descriptive term, being the ordinary word wash with a very ordinary termination added to it. Burland *vs.* Broxburn, (1889) 6 RPC 482.
- INSTEA (a mere condensation of the expression 'instant tea'), Nestle's *vs.* Thankaraja, AIR 1978 Mad. 336.
- PANORAM for photographic cameras and films. Kodak *vs.* London Stereoscopic, (1903) 20 RPC 337.
- TARZAN (a word though newly coined but had acquired a definite meaning and referred to a comic character). Tarzan Tm, (1969) RPC 301.

### Non Descriptive Words

A trade mark shall not be registered unless it contains or consists of one or more words having no direct reference to the character or quality of goods and not being, according to ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India.

Non-descriptive words are commercially the most popular trademarks. Non-descriptive word would be any other than an invented word whether it is already existing or newly coined. Thus, words coined from existing stock of words in the dictionary by addition of a prefix or suffix or by deletion of one or more letters therefrom.

The non-description word has however, to be distinctive in order to be registrable.

The non-descriptive words should have no direct reference to the quality or character of goods. For example, the word 'SAFFO' was held not registrable for cleaning power and liquid for being too close to the word 'SAFF' meaning clean, white. It was held it was descriptive word [Hindustan Lever *vs.* Kilts, (1982) PTC 38].

The word 'SATININE' was held descriptive of laundry starch as it suggested that the starch would conduce to the production of a very glossy surface [Meyerstein's Application (1890) 7 RPC 114]. As such not registrable.

The non-descriptive word must be non-laudatory. The word 'SUN' was held non-laudatory of lanterns and globes for lamps although rays of sun dispel darkness [Mohd. Rafiq *vs.* Modi Sugar, AIR 1972 Delhi 46 ast 49]. Hence entitled to registration.

The word 'SOLAR' was held not descriptive of photographic apparatus, studio light, projections, and photographic enlargers, hence entitled to registration.

In the case of 'Staph Guard' [(1967) RPC 165], the words 'Staph Guard' in relation to laundry washing machines was refused on the ground that the words were descriptive of machine having certain special features viz., for guarding against infection by 'Staphylococcus (a bacteria). A reference to the known abbreviation "Staph" is real and of serious import.

The law regarding non-descriptive words as laid down in *H.D. Corporation vs. Dy. Registrar of Trade-Marks* [AIR 1955 Calcutta 519], is discussed below.

In this case, the question arose whether the word "Rasoi" being a common word of the language could be registered as a trade mark. The point for dispute in this case were as follows:

- Whether the word 'Rasoi' if and when used as a trademark for the hydrogenated groundnut oil manufactured by the appellant company has a direct reference to the character or quality of goods?
- If the word 'Rasoi' cannot be said to have such direct reference, must the mark be still proved to be distinctive in order to be eligible for registration, or should it be taken to be regarded as *prima facie* distinctive by the Act itself?
- Even if the word 'Rasoi' has no such direct reference and even if it is distinctive, then whether in view of the fact that it is a common word of the language of which no monopoly should be granted to any particular trade?

The Court held that Section 9 (1) (d) of the Trade and Merchandise Act, 1940 provides that a trade mark shall not be registered unless it contains or consists of one or more words having no direct reference to the character or quality of goods. In considering whether a mark has reference to the character or quality of goods, the mark must be looked at, not on its grammatical significance, but as it would represent itself, to the public at large. To the general public, the word 'Rasoi' means cooking. The normal use of hydrogenated groundnut oil is for cooking purpose, thus the use of the commodity as intended or adapted undoubtedly forms part of its character. To people in the trade and to the consumers, the word 'Rasoi' would thus imply a direct reference to the character of the goods.

### Non-descriptive Words, Registration Allowed

- SUN for lanterns; RADIATION for gas-stoves.
- SOLAR for photographic apparatus, studio light, etc. *Central Camera vs. Registrar*, (1980) I. PLR 1.
- SULEKHA meaning 'good writing', but also a feminine personal name, registered on ground of distinctiveness. *Mehta vs. Registrar*, AIR 1962 Bom. 82.
- DORA for ganjees/vests (the word dora means thread or strips, also a feminine personal name, registered on ground of distinctiveness). *Chandra Bhan vs. Arjundas*, AIR 1974 Cal. 183.
- PARIWAR meaning 'family' not considered laudatory in respect of soaps by the mere fact that soap was used by the entire family. *Jyoti Soap vs. Registrar*, (1982) PTC 551.
- CHIN-CHIN for alcoholic beverages (allowed in part-B of Register) *Chin-Chin Tm*, (1965) RPC 136.
- STAYFREE for sanitary napkins, etc, (allowed on evidence of user). *Christine Holden vs. Johnson & Johnson*, (1990) IPLR 96.

### Words Found Descriptive — Registration Refused

- SAFO for cleaning powder (too close to the word 'saf' meaning clear pour, white, etc.) *Hindustan Lever vs. Kilts*, (1982) PTC 38.
- CENTURY for machines refused on ground of descriptive reference. Common use of the expression like 'Marvel of the Century' and 'Machine of the Century'. *Century Electronics vs. C.V.S.*, (1983) FSR 1.

- CHARM for hosiery (ladies stockings) Keystone Knitting Mills 'Tm' (1928) 45 RPC 193.
- CARNIVAL for cigarette (the word meaning "revelry" and feasting). Llyod & Son's Tm, (1893) 10 RPC 281.
- TASTEE-FREEZ for ice cream. Tastee-Freez Tm, (1960) RPC 255.
- PERFECTION for soaps (purely laudatory word). Crosfield's Appln., (1909) 26 RPC.
- HEALTH for cocoa, chocolate, etc. (a commendatory epithet and not distinctive). Henry Throne *vs.* Eugen Sandow, (1912) 29 RPC 440.
- RASOI for vegetable oil.

### Rights Conferred by Registration of Trade Mark

Section 28 of the Trade and Merchandise Marks Act, 1958 confers on the proprietor of the trade mark, exclusive right to use of the trade mark in relation to the goods in respect of which the trade mark is obtained.

In addition to conferring the right of exclusive dealing, the proprietor of a trade mark also has a right to file a suit for infringement of his right and obtain

- (I) Injunction,
- (II) Damages,
- (III) Account of profits,

The rights conferred are not absolute. The Act lists out the limitations, which can be imposed on the exclusive rights.

- The trade mark when it is subject to conditions and limitations entered on in the Register. Any use of the mark beyond the scope of the rights granted is not protected. *For example*, a trademark of soap is registered in India. There can be no infringement action when the same mark is used in a foreign country for a similar product if the trade mark has been registered imposing territorial restrictions on its use.
- The registration of a trade mark will not entitle the proprietor to bring infringement action against proprietor of identical or similar marks which also happen to be registered. *For example*, there are many brands of spices in the market. Some of them quite popular are MDB and BDH. This provision would prohibit the proprietor of MDH from bringing a suit for infringement, if the mark BDH happens to be registered.
- Section 30 of the 1999 Act lays down limits on the effect of registered trade mark. A registered trademark can be used by any person for purposes of identifying goods or services if the use of the mark is in accordance with honest practices in industrial or commercial matters and also if it is met such which takes unfair advantage of or is detrimental to the distinctive character of repute of the trade mark.
- No infringement will be involved in cases:
  - If the use is in relation to goods or services and it indicates the kind, quality, quantity, intended purposes, value, geographical origin, the time of production of the goods or of rendering of services or other characteristics of goods or services; and
  - If a trade mark is registered subject to any conditions or limitations, the use of the trade mark in any manner in relation to goods to be sold or otherwise traded in relation of goods to be exported or in relation to services for use in any place or country outside India.

Or

If the use of a trade mark —



(i) in relation to goods connected with the proprietor or a registered user of the trade mark if the registered proprietor/user has applied the trade mark and has not subsequently removed it, or has at any time consented to the use of the trade mark.

(ii) in relation to services to which the proprietor/registered user has applied the mark to indicate that those services have been performed by such proprietor/registered user.

- If use of a trade mark by a person in relation to goods adopted to other goods or services for which the trade mark has been used without infringement of the right given by registration under this Act or might be used if such use is reasonably necessary to indicate that the goods and services are so adapted.

If the use of the registered trade mark being one or two or more identical or nearly resembling trademarks, in exercise of the right to use such trademark given by registration under the Act.

If the goods bearing a registered trade mark are lawfully acquired by a person, he would be entitled to sell the goods in the market and it will constitute no infringement if that registered trade mark has been assigned by its proprietor to some other person after such goods had been acquired.

No infringement would also be involved if the goods put on the market under the registered trade mark are put in the market either by the proprietor of the trade mark or else with his consent.

However, infringement will occur if the proprietor of the registered trade mark opposes further dealings in the goods particularly when the condition of the goods has been changed or impaired after they had been put on the market.

## Infringement of Trade Marks

Infringement of trade mark occurs if a person other than the registered proprietor in the course of trade in relation to the same goods for which the mark is registered, uses the same mark or a deceptively similar mark.

### Essentials of Infringement

- The taking of any essential feature of the mark or taking the whole of the mark and then making a few additions and alterations would constitute infringement.
- The infringing mark just be used in the course of trade, i.e. in a regular trade wherein the proprietor of the mark is engaged.
- The use of the infringing mark must be printed or usual representation of the mark in advertisement invoices or bills. Any oral use of the trademark is not infringement.
- Any or all of the above acts would constitute infringement if the same is done in such manner as to render the use of the mark likely to be taken as being used as a trademark.

**Forms of Infringement.** A registered trade mark is infringed if used in the course of trade by a person other than the registered proprietor or permitted user of such trademark. The infringement occurs because such mark used by the one other than the registered proprietor or permitted user is likely to cause confusion in the mind of public or is likely to cause impression of association with the registered trade mark. And such confusion is caused because of the identity of such mark with the registered trade mark as also the similarity of goods or services covered by such registered trade mark. Such confusion can also occur because of the similarity of such mark to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark. The confusion would also be caused because of such mark's identity with the registered trade marks as well as the identity of the goods or services covered by such registered trade marks.

A registered trade mark is also infringed by a person who applies such trade mark to a material intended to be used for labelling or packaging goods, as a business paper or it is used for advertising goods or services provided that when he applied the mark in such manner, that he knew or had reason to believe that such application of the mark was not duly authorized by the proprietor or a licensee of the registered trademark.

A registered trade mark is also infringed by any advertising of that trade mark if such advertising takes unfair advantage of and is contrary to honest practices in industrial or commercial matters. Also if it is detrimental to the distinctive character of the registered trade mark. Also if it is against the reputation of the registered trade mark.

A registered trade mark will be infringed by the spoken use of words as well as by their visual representation in cases where the distinctive elements of a registered trade mark consist of or include such works.

A registered trade mark will be infringed by a person if he in particular affixes it to goods or packaging thereof or offers or exposes goods for sales, puts them on the market or stocks them for such purposes under the registered trade mark or offers or supplies services under the registered trade mark.

**I. Using a deceptively similar mark.** The infringement that deception or confusion has been caused may arise in the following ways:

- (i) *Deception or confusion as to goods* — A person may buy the goods seeing one mark thinking that it is the brand, which is in his mind, which in fact is not the case. This is the most common type of confusion or deception.
- (ii) *Deception or confusion as to trade origin* — A person looking at a mark may buy the goods thinking that it is coming from the same source as some other goods bearing a similar mark with which he is familiar. This is deception or confusion as to trade source.
- (iii) *Deception or confusion as to trade connection* — A person looking at the mark may not think that it is the same as one with a different brand in his mind but the similarity may make him believe that the two are in some way or other connected with each other. The use of the mark might give rise to a belief in the purchasers' mind of there being some connection with the goods and the owner of the registered Trade Mark.

#### **Illustrative Case Laws**

- Plaintiff was selling cosmetic products under the registered Trade Mark "Lakme." Defendant was using the Trade Mark "Like-me" for the same class of products. It was held that there was striking resemblance between the two words. The two words are also phonetically similar. There is every possibility of deception and confusion being caused in the minds of the prospective buyers of the plaintiff's products. Injunction was made permanent (PTC 1996, 567).
- Plaintiff's were registered proprietors of the Trade Mark 'MITASO' the defendants used the marks 'METASHOW'. Infringement was alleged on the ground that the two marks on the face of it were deceptively similar phonetically and any ordinary customer could be easily misled in treating the goods of one as coming from the source of another. Injunction restraining the defendants from using the Trade Mark 'METASHOW' was granted (PTC 1995, 105).
- The party in the Trade Marks Registry made an application for registration of Trade Mark 'FIXACOL'. The opponents were registered proprietors of Trade Mark 'FEVICOL' who pleaded rejection of the application on the grounds of deceptive similarity and confusion. The application was refused registration on the above grounds (PTC 1995 105).
- The plaintiff's were a reputed manufacturer of dental cream COLGATE. Defendants used the mark COLLEGIATE, which is phonetically similar to the plaintiff's mark with deceptively similar letters in white with red background so as to cause confusion in the minds of the customers and to pass off its products as COLGATE. Hence the mark was restrained through injunction (PTC 1995, 389).

- The Supreme Court in *Amritdhara v. Satya Deo* observed that the ordinary purchaser would go more by the overall structure and phonetic similarity and the nature of medicine he has previously purchased or has been told about or about which he has otherwise learnt and which he wants to purchase. The words 'Amritdhara' were held deceptively similar though registration of 'Lakshmandhara' was allowed on the basis of honest concurrent user (AIR 1963 SC 453).

Besides the obvious and most prevalent infringement by use of a deceptively similar mark the following activities also amount to infringement.

**II. Taking substantial feature of the mark would be infringement.** A mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of the essential feature however, infringement is not to be judged by the ocular test alone. It has, therefore, long been accepted that if a word forming part of mark has come in trade to be used to identify the goods of the owner of the mark, it is an infringement of the mark itself to use that word as the mark or part the mark of other traders.

**III. Addition.** Addition of extraneous matter, inconspicuous additions is infringement. If a person incorporates whole or part of a registered Trade Mark of another, the addition of other or matter would not save him from the charge of infringement.

**IV. Use of registered trade mark along with a name other than that of registered proprietor constitutes infringement.** Use of trade mark of registered proprietor with the name other than of a registered user constitutes infringement.

In *Levi vs. Shah*, (1985 RPC 371) the plaintiffs had registered trade marks consisting of labels respectively coloured red, orange, white, black and blue sewn "LEVI'S" also a registered trade mark was invariably added to the tabs. The defendants sold jeans and white tabs similar to the registered trade mark sewn into the pockets. It was held as a case of infringement.

**V. When mark is copied, it amounts to infringement.** If the infringer has absolutely copied the mark and made a facsimile representation of it, no further evidence is required. When the similarities are so close as to make it impossible to suppose that such marks were devised independently of each other, in the absence of evidence of a common origin, the conclusion is always that one party copied the mark of another.

**VI. Use of reconditioned or second hand articles.** The use of the plaintiff's mark on reconditioned goods may constitute infringement even if it is clarified that goods are not original but only reconditioned.

**VII. Printing of labels is infringement.** Unauthorised printing of labels of the plaintiff will constitute infringement. If a copyright subsists in labels, it will constitute infringement of such copyright as well.

**VIII. Goods manufactured by third party would constitute infringement.** When the owner of a mark gets the goods manufactured by a third party under a contract, solely for the mark, sale of the goods bearing the mark by such a manufacturer to other persons would constitute infringement.

### Action for Infringement

The civil action for infringement lies in instituting a suit.

**Where a suit is to be instituted.** A civil suit for infringement of a registered trademark must be filed in District Court within whose territorial jurisdiction where the infringement takes place. Where the High Court has the original jurisdiction to entertain such suits beyond a certain financial limit, infringement proceedings can be instituted directly in the High Court. No Court lower than the District Court can entertain such a suit.

**Procedure followed.** The procedure followed in the disposal of the suit is as laid down in Code of Civil procedure, 1908.

**Period of Limitation.** Under the Limitation Act, 1963, the period of limitation for filing a suit for infringement of a trade mark is three years from the date of infringement. Where the infringement is a continuing one, a new course of action arises every time an infringement occurs. For instance, in a continued sale of infringement article, sale of each article would give rise to a fresh cause of action.

**Who can sue for infringement?** The plaintiff in an infringement suit may be either:

- The proprietor of the registered trade mark or his legal successor.
- A registered user of a trade mark subject to a prior notice to the registered proprietor and consequent failure of the registered proprietor to take any action against the infringer.
- An applicant for registration of a trade mark. He can file an infringement suit to protect his right to continue with the suit, which will sustain only if his trademark is registered before the hearing of the suit.
- Legal heirs of the deceased proprietor of a trade mark.
- Any one of the joint proprietors of a trade mark.
- A foreigner proprietor of trade mark registered in India when infringement occurs in India.

**Who can be sued?**

- The infringer who directly by his action causes infringement or who uses or contemplates or threatens to use a trade mark infringing the plaintiff's right.
- The master responsible for his servant's act of infringement. He is to be made the defendant in such suit. For example, a worker who is engaged in the business of making fake labels is a servant of the master who orders the making of such labels. It is the master in such a case who is to be sued.
- The agents of an infringer.
- Directors and promoters of a limited company cannot be joined as co-defendants unless they have personally committed or directed infringing acts.

**Relief in Suits for Infringement or Passing off.** The types of relief to which a plaintiff is entitled are —

- An injunction restraining further use of the infringing marks.
- Damages or an account of profits.
- An order for delivery-up of infringing labels and marks for destruction or erasure.

The plaintiff is entitled to the above relief both in an infringement and passing-off action.

## THE COPYRIGHT ACT

### Introduction — Meaning

The word 'Copyright' is derived from the expression 'Copier of words' first used in the context, according to Oxford Dictionary, in 1586. The word 'Copy' according to Black's Law Dictionary means "transcript, imitation, reproduction of an original writing, painting, instrument or the like"-----.

Copyright according to Black's Law Dictionary is — "the right in literary property as recognised and sanctioned by positive law. An intangible incorporeal right granted to the author or originator of certain literary or artistic production whereby it is invested for a specified period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them."

Copyright is defined in the Oxford English Dictionary as an exclusive right given by law for a certain term of years to an author, composer etc. (or his assignee) to print, publish and sell copies of his original work.

India has afforded protection of copyrights only since 1957. After partaking in the Berne Convention, India implemented the Indian Copyright Act in 1957 and has been active in making appearances at conferences dealing with copyright. India, was the party to the Geneva Convention for the Protection of Right of Producers of Phonograms and to the universal copyright convention.

India's copyright laws have been amended periodically to keep pace with technological and other changes in the environment. The Act, presently in force was legislated in the year 1957 and is known as Copyright Act, 1957 as amended by Copyright (Amendment) Act, 1999. It adopted many principles and provisions contained in the U.K. Act of 1956. Some amendments have involved satellite broadcasting, computer software, digital technology, performer's rights and civil and criminal remedies against infringement. India is in full agreement with these obligations under the TRIPs agreement.

Though India's protection of copyrights is considered good, and is in the top half range of all countries in the world, there has been lax on its implementation. The strong law is rendered ineffective as many violations go unchallenged.

**Copyright is protection in form and not in idea.** Copyright is a right given to or derived from works and it is not a right in novelty only of ideas. It is based on the right of an author, artist or composer to prevent another person from copying his original work, whether it is a book, a tune or a picture, which he created himself. There is nothing in the notion of copyright to prevent another person from providing an identical result (and himself enjoying a copyright in that work) provided it is arrived at through an independent process.

There is no copyright in ideas. Copyright subsists only in the material form to which the ideas are translated. In the field of literary work the words chosen by the author to express his ideas are peculiar to himself and no two descriptions of the same idea or fact can be in the same words, just as no two answers written by two different individuals to the same question can be the same. The order and arrangement of each man's words is as singular as his countenance. It is the form in which a particular idea, which is translated that is protected.

A person may have a brilliant idea for a story or for a picture but if he communicates that idea to an artist or play writer then the production which is the result of the communication of the idea is the copyright of the person who has clothed the idea in a form (whether by means of a picture or play) and the owner of the idea has no rights in the product. Since there is no copyright in ideas or information, it is no infringement of copyright to adopt the ideas of another or to publish information derived from another, provided there is no copying of the language in which those ideas have or that information has been previously embodied.

**Works in Which Copyright Subsists.** Section 13 of the Act lists out the works, in which copyright subsists. It reads as follows:

Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say —

- Original Literary, Dramatic, Musical and Artistic Work,
- Cinematograph Films, and
- Sound Recording.

**Literary Work** includes computer program's, software manuals, training manuals, tables, compilations including computer databases, novels, notification prose, poetry, newspaper articles and newspapers, magazine articles and magazines, catalogs, brochures, ads (text).

**Dramatic Work** includes plays, operas and skits, choreographic work or entertainment in a dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film.

**Musical Work** includes songs, advertising jingles and any graphical notation of such work but does not include any works or any action intended to be sung, spoken or performed with the music. For instance, an actor's movements while rendering the song in a movie cannot be copyrighted.

**An Artistic Work** includes a painting, a sculpture, a drawing (including a diagram, map, chart or posters), an engraving or a photograph, cartoon strips and cartoon characters, whether or not any such work possesses artistic quality. A work of 'architecture' means any building or structure having an artistic character of design or any model for such building or structure.

**Cinematograph Film** includes movies, documentaries, travelogues, training films and videos, television shows, television ads and interactive multimedia works.

Cinematograph film means any work of usual recording on any medium produced through a process from which a moving image may be produced by any means. It includes a sound recording accompanying such visual recording and 'Cinematograph' shall be construed as including any work produced by any process analogous to cinematography.

**Sound Recording** includes music, sounds or words. Sound recording means a recording of sounds from which such sound may be reproduced regardless of the medium on which such recording is made or method by which the sounds are produced.

Thus, copyrights may be used to protect ads and product package designs. The trade mark registration protects brand name and / or icon, logo etc., whereas the copyright can protect artistic work on package and label, advertisement, tag lines, video images etc.

In *M/s. Anglo-Delhi Paint, Colour and Varnish Works Ltd. vs. M/s. India Training House* (AIR, 1977, Del. 41) case the court found that except for the phonetic differences between the numerals "1001" used by the plaintiff and "9001" used by the defendant, the entire getup, the combination of the colours, words "Super White" on top and "Zinc Paint" on the bottom, in white circle with grey lettering super imposed on violet background were absolutely copied. The defendant were unable to offer any explanation as to why they have chosen the getup similar to that of the plaintiff. Temporary injunction was granted by the court, till the disposal of the case.

### Rights Conferred by Copyright

Types of Rights
<ul style="list-style-type: none"> <li>● Statutory right.</li> <li>● Negative right.</li> <li>● Multiple rights.</li> <li>● Economic rights.</li> <li>● Moral rights.</li> </ul>

**Box 4.2**

**Statutory Right.** The copyright in a work is a creation of statute. A person owns a copyright because the law recognises the existence of such a right. The rights, which an author of a work has by virtue of creating the work, are well defined. Section 14 of the Copyrights Act defines them as under :-

'For the purposes of this Act, "Copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely :

(I) *In the case of a literary, dramatic or musical work, not being a computer programme:*

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
- (ii) to issue copies of the work to the public not being copies already in circulation.
- (iii) to perform the work in public or communicate it to the public;