

- (iv) to make any cinematograph film or sound recording in respect of the work;
 - (v) to make any translation of the work;
 - (vi) to make any adaptation of the work;
 - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi).
- (II) *In the case of a computer programme:*
- (i) to do any of the acts specified in clause (I);
 - (ii) to sell or give on hire, or offer for sale or hire any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (III) *In the case of an artistic work:*
- (i) to reproduce the work in any material form including depiction in two dimensions of a three dimensional work;
 - (ii) to communicate the work to the public;
 - (iii) to issue copies of the work to the public not being copies already in circulation;
 - (iv) to include the work in any cinematograph film;
 - (v) to make an adaptation of the work;
 - (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);
- (IV) *In case of a cinematograph film:*
- (i) to make a copy of the film, including a photograph of any image forming part thereof;
 - (ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
 - (iii) to communicate the film to the public;
- (V) *In the case of a sound recording:*
- (i) to make any other sound recording embodying it;
 - (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;
 - (iii) to communicate the sound recording to the public.

Negative right. Copyright is a negative right in the sense that it stops others from exploiting the work of the author for their own benefit without the consent or licence of the author. It does not confer any positive right on the author himself.

Multiple rights. Copyright is not a single right but a bundle of rights which can exist and be exploited independently. The nature of these multiple rights depends upon the categories or works, namely,

- (i) Literary, dramatic and musical works,
- (ii) Original artistic works,
- (iii) Cinematograph films, and
- (iv) Sound recording.

For example in case of a literary work copyright comprises the right of reproduction in hard back and paper back editions, the right of serial publication in newspapers and magazines, the right of dramatic and cinematographic versions, the right of translation, adaptation, abridgement and the right of public performance.

Economic rights. The rights conferred by Section 14 on a copyright owner are economic rights because the exploitation of the work by the author by exercising these rights may bring economic benefit.

The author may exploit the work himself or license others to exploit any one or more of the rights for a consideration which may be in the form of royalty, a lump sum payment.

Moral rights. The copyright besides conferring economic benefits, also confers moral rights on the author. Such rights though not statutorily defined are as follows:

- (i) The right to decide whether to publish or not to publish the work, i.e. the right of publication.
- (ii) The right to claim authorship of a published or exhibited work.
- (iii) The right to prevent alteration and other actions that may damage the author's honour or reputation - the right of integrity.

The Bern Convention recognises some of these rights and requires member States to provide the author with the right to claim authorship and to object to alterations. These rights remain with the author even after the transfer of copyright and such rights last throughout the entire term of the copyright.

These moral rights are recognised as "Author's Special Rights" under the provisions of Section 57 of the Act (as amended by the Amendment Act of 1994).

These rights are:

- (i) to claim authorship of the work.
- (ii) to restrain or claim damages.

These rights are conferred on the author even after the assignment of the copyright. The author's computer programs are treated differently.

Term of Copyright

The term of copyright is fixed keeping in view the interest of the author and that of the general public. The interest of the author is in protecting his work as long as possible whereas the interest of the public is in making the work a public property as soon as possible. The protection of the interest of the author assumes primary importance in view of the fact that the assurance that their work will bear their name and be protected by law serves as a stimulant to creative minds to produce literary works.

The interest of the public is served by recognising the 'principle of fair dealing' where the use of the copyright work by a person other than the author himself does not constitute infringement of the copyright.

The term of copyright varies according to the nature of the work.

Term of copyright in literary, dramatic, musical or artistic works. Section 22 provides:

Copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.

Infringement of copyright. The purpose of recognising and protecting the copyright of an author is to statutorily protect his work and inspire him to exercise his creative faculties further.

A copyright confers exclusive right on the copyright owner, *inter alia*, to the reproduction of the work in a material form, storing the work in any medium by electronic means, publication of the work, performance of the work in public, making of its adaptations and translations.

These rights are conferred on the owner of the copyright to enable him to reap monetary benefits. If any of the above acts are carried out by a person other than the owner of the copyright, without a licence from the owner, it constitutes infringement of the copyright.

Copyright is granted for a specific period of time. Whether an act is an infringement or not would depend on the facts whether copyright is subsisting in the work or not. In case the copyright in the work has expired, the work falls in the 'public domain' and any act of reproduction of the work by any person other than the author would not amount to infringement.

Acts which constitute infringement. Since the forms of creative works are numerous, i.e. literary, dramatic, musical, artistic, etc., the acts which would constitute infringement would depend upon the nature of the work.

Section 51 of the Act defines infringement of a copyright not specifically with respect to each kind of creative work, but in general terms. According to Section 51 of the Act, copyright in a work shall be deemed to be infringed:

- (a) when any person without a licence from the owner or the Registrar of Copyrights does anything, the exclusive right to do which is by this Act conferred upon the owner of copyright, or permits for profit, any place to be used for the communication of the work to the public, unless he was not aware and had no reasonable ground for believing that such communication would be an infringement of copyright; or
- (b) when any person:
 - (i) makes for sale or hires or sells or lets for hire or by way of trade displays or offers for sale or hire any infringing copies of the work covered by copyright; or
 - (ii) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, any infringing copies of the work; or
 - (iii) exhibits in public by way of trade any infringing copies of the work; or
 - (iv) imports into India any infringing copies of the work except the copy of any work for the private and domestic use of the importer.

The reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an infringing copy.

Acts not Constituting Infringement

Statutory Exceptions. The use of a copyright work by any person other than the owner of copyright is an infringement. However, the Copyright Act recognises certain acts, which though done by a person other than the owner of copyright would not amount to infringement of the copyright. The purpose of recognising these exceptions is to enable the reproduction of the work for certain public purpose for encouragement of private study and research and promotion of education. The defendant in an action can plead these exceptions in defence for infringement of copyright.

Section 52 lists the acts, which do not constitute infringement of copyright. These are:

- (i) A fair dealing with a literary, dramatic, musical or artistic work not being computer programs for the purposes of private use including research, criticism or review, making copies of computer programs for certain purposes, reporting current events in newspapers and magazines or by broadcasting or in a cinematograph film or by means of photographs.
- (ii) Reproduction of judicial proceedings and reports thereof, reproduction exclusively for the use of members of legislature, reproduction (artistic work excluded) in a certified copy supplied in accordance with law.
- (iii) Reading or recitation in public of extracts of literary or dramatic work.
- (iv) Making or publishing of a painting, drawing or photographs of a work of architecture.
- (v) Making or publishing of a painting, drawings, or photographs or engraving of sculpture or other artistic work permanently situated in a public place.
- (vi) Reproduction for the purpose of research or private study or with a view to publication of an unpublished literary, dramatic or musical works kept in a library, museum or other institution to which the public has access.

Remedies Against Infringement of Copyright

Kinds of remedies. There are three kinds of remedies against infringement of copyright, namely:

Civil remedies. Injunction, damages or account of profit, delivery of infringing copies and damages for conversion.

Criminal remedies. Imprisonment of the accused or imposition of fine or both and seizure of infringing copies.

Administrative remedies. Administrative remedies consist of moving the Registrar of Copyrights to ban the import of infringing copies into India when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright and seeking the delivery.

Kinds of Civil Remedies to which a plaintiff is entitled

- Anton Pillar Order
- Interlocutory Injunction
- Damages or Account of Profits.

Anton Pillar Order: The procedure of law always provides equal opportunities to both the parties to present their case. However, in certain cases the court may, on an application by the plaintiff, pass an *ex parte* order requiring the defendant to allow the plaintiff accompanied by attorney to enter his premises and make an inspection of relevant documents and articles and take copies thereof or remove them for safe custody. Such order is called Anton Pillar Order.

Such orders are necessary when there exists an apprehension in the mind of the plaintiff and the court that following the regular procedure would give time to the defendant to destroy relevant documents and (copies of) the articles, defeating the ends of justice.

Such an order is, however, passed very cautiously by the court; only when the plaintiff in his application makes the fullest possible disclosure of all material facts within his knowledge and the court is convinced thereby.

Interlocutory Injunction. Interlocutory injunction secures the immediate protection of copyright from an existent infringement or from the continuance of infringement or an anticipated infringement. A plaintiff may pray for an interlocutory injunction pending trial or further orders.

For obtaining an interlocutory injunction the plaintiff has to establish:

- (i) A *prima facie* case,
- (ii) Balance of convenience in his favour,
- (iii) That refusal to grant interlocutory injunction would cause irreparable injury to the plaintiff.

The defendant, if injured as a result of such injunction, is entitled to compensation by virtue of an undertaking as to damages, which is made by the plaintiff. Such an undertaking on the part of the plaintiff is a condition precedent for the grant of interlocutory injunction.

Interlocutory injunction may be refused when:

- (i) The interest of the plaintiff can be protected by ordering the defendant to keep an account of profits.
- (ii) The defendant has pleaded and established *bonafide* fair dealing.
- (iii) The plaintiff has been guilty of undue delay in coming to the court, or
- (iv) His conduct amounted to acquiescence in the infringement.
- (v) There are substantial doubts about the plaintiff's right to succeed in the action.

The grant of interlocutory injunction would depend on the overall circumstances of the case.

Damages on account of profits

The plaintiff is entitled to two types of damages, viz.,

- (i) One for infringement of his copyright, and
- (ii) The other for conversion of his copyrighted work into another form.

Account of profits. A plaintiff, if successful, is also entitled to account of profits as an alternative to damages.

Criminal Proceedings Against Infringement

In addition to civil remedy, the plaintiff can initiate criminal proceedings against an infringer.

These two remedies are distinct and can be invoked simultaneously.

The infringement of copyright is an offence, punishable with imprisonment which may extend from a minimum period of six months to a maximum of three years and with a fine of Rs. 50,000 to Rs. two lakhs.

Court where criminal proceedings are to be initiated. No court inferior to that of a Presidency Magistrate or a Magistrate of the First Class can try an offence under the Act.

The conduct of the criminal proceedings is governed by the Criminal Procedure Code. The Court trying the offence may order that all copies or instruments for making infringing copies in possession of the alleged offender be delivered to the owner of the copyright without any further proceedings. The court may also order a police officer of the rank of Sub-Inspector and above to seize without warrant, all infringing copies of the work and accessories for making infringing copies and produce them before the Magistrate.

Threat of legal proceedings. Threat of legal proceedings also serves the purpose at times. On coming to know of violation of copyright, the owner of copyright may send a notice to the infringer requiring him to discontinue forthwith the act, which amounts to infringement. The infringer may comply with the request and agree to pay compensation settled by mutual agreement. However, the threat of legal proceeding is an efficacious remedy only when the nature of infringement is such that further infringement is neither profitable for the defendant nor is it likely to be repeated, for instance, the performance in public of a dramatic or musical work.

In case where infringement is in the form of reproduction of the copyright work in large numbers and is a profitable venture such a threat generally fails to stop further infringement. In such case court action becomes necessary.

Registration of Copyright

Rule 16 of Chapter VI, Copyright Rules, 1958 lists out the procedural formalities, which an applicant has to fulfil when filing an application for registration of copyright. It states that one application is to refer to one work only, it shall be made in triplicate (three copies of the same) accompanied by the prescribed fee.

The steps for registration (Fig. 4.1).

- (I) The persons applying for a copyright has to give notice of his application to every person who claims or has any interest in the subject-matter of the copyright or disputes the rights of the applicant to the copyright, for instance, in case of joint authorship when only one of the authors makes an application, a notice of such an application is to be given to the other author.
- (II) If no objection to such registration is received by the Registrar of Copyrights within thirty days of the receipt of the application, he shall be satisfied by the correctness of the particulars given in the application, enter the particulars in the Register of Copyrights.

- (III) If the Registrar of Copyright receives any objection to such registration within the time of thirty days of receipt of the application, he may, after holding such inquiry as he deems fit, enter such particulars of the work in the Register of Copyrights, as he deems proper.
- (IV) The Registrar of Copyrights shall, as soon as may be, send, wherever practicable, a copy of the entries made in the Register to the parties concerned.

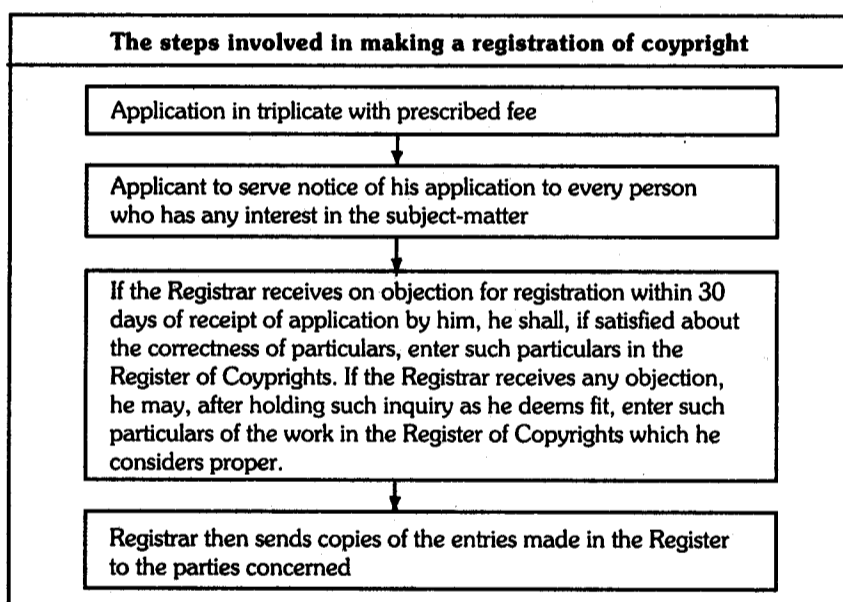


Fig. 4.1

Appeal

Any person aggrieved by the decision or order of Registrar of Copyrights, may, within three months from the date of the order or decision, appeal to the Copyright Board.

THE DESIGN ACT

Introduction

An article is distinguished not only by its utility but also by its visual appeal, which too usually plays an important role in shaping the buyers preference for the article. Therefore, the Design of an article and even design of its packaging is important from the commercial viewpoint. The Design Act, 1911 aims at protecting the designs which serve the purpose of visual appeal.

Definition of Design

Design means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye, but does not include any mode, principle of construction or anything which is in substance, a mere mechanical device and does not include any trademark as defined in Trade Marks Act, 1999 or property mark as defined in Section 479 of the Indian Penal Code.

Thus, if a person makes an article in a certain shape not in order to make it appeal to the eye of a customer but solely to make the article work or to perform functional requirements such design is not registered. The shape of a car, for instance, with aerodynamic bonnet is not registrable because the

aerodynamic shape serves a functional purpose but the plush interiors of the car could be a subject matter of design.

Administration of Act

The Design Act, 1911 is administered by the Controller General of Patents, Design & Trade Marks, under the control and supervision of the nodal ministry, the ministry of Industry, Department of Industrial Development, New Delhi.

Registration of Design

All application for registration of designs or any proceedings in respect of the Act., and the rules are to be made to the controller of patents at the Patent Office, 2nd M.S. Building, Nizam Palace, 234/4, Acharya Jagdish Bose Road, Calcutta 700017. The Procedure for registration is contained in Secs. 43-45 of the Designs Act and rules 34-43 of the Designs Rules.

Any person claiming to be the proprietor of any new and original design not previously published in India may apply for registration of the design. For the purpose of registration, goods are classified into 14 classes.

An applicant may endorse on the application a brief statement of the novelty he claims for his design as for example: "novelty resides in the shape of ash-tray as illustrated"; "novelty resides in the shape or configuration in the bookshelf as illustrated"; "novelty resides in the ornamental surface pattern of the football as illustrated; "novelty is claimed for the floral ornamentation of the pot as illustrated" and so on.

If the application is in order and satisfies the requirements of the Act and the Rules the Controller will accept the application and register it. The design when registered will be registered as of the date of the application for registration.

Certain emblems and seals like the emblem and seal of the United Nation Organisation, of the World Health Organization, of the Government of India or any State and the Indian National Flag are not registrable as design.

Registration of the design in the first instance will be for a period of five years, which can be extended twice by five years at a time. Thereafter, the copyright in the design becomes public property and anyone can use it. There is a provision for correction of clerical errors and cancellation and rectification of the register.

Cancellation of registration of a design can be effected by an order of the High Court on the petition of a person interested on the grounds that the design has been previously registered, or that it has been published in India prior to the date of registration, or that the design is not new or original. Rectification of any entry in the register except cancellation of the entire registration on certain grounds may be effected by the Controller on an application by a person aggrieved.

The registered proprietor of the copyright in a design may assign the design or grant licenses to use the design or otherwise deal with the design. The assignment or license should be in writing and registered with the Controller.

Where a design is registered it is not open to inspection by the public until two years from the date of registration except by specified persons (Section 50 of the Designs Act.)

The right conferred by registration of a design is called 'copyright'. This appears to be a misnomer, as it has no resemblance to the copyright under Copyright Act. This right is a monopoly right more akin to the right given under the Patents Act.

Copyright in an industrial design or product design is governed by the Designs Act, 1911. If a design is registered under this Act it is not eligible for protection under the Copyright Act even though it may be original artistic work. In the case of a design which is capable of registration under the Designs Act, but not so registered, copyright will subsist under the Copyright Act, but it will cease to exist as soon as any article

to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright. Therefore, it is highly recommended that industrial designs be registered under the Designs Act.

PROCEDURE FOR REGISTRATION OF A DESIGN

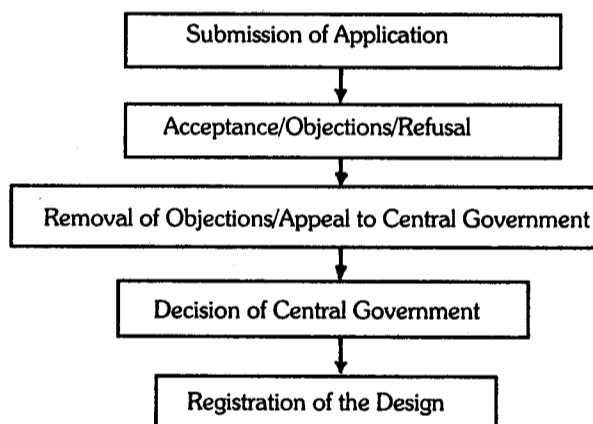


Fig. 4.2

Rights Conferred by Registration. The registered proprietor of a design has the exclusive right to apply a design to any article in any class in which it is registered. This right is called a copyright in the design. The nature of the copyright is different from the copyright under the Copyright Act.

The rights conferred by registration is subject to the following conditions:

- The design applied to the article is one, which has been registered by the controller.
- The articles on which the design is applied should be marked with the word “Registered” or its abbreviation ‘Regd’ or ‘RD’ followed by the registration number. This requirement is waived in the case of designs registered for lace and printed or woven designs on textile goods. These exceptions are made having regard to the practical difficulty of marking.

If the proprietor fails to apply the marking as above, he will not be entitled to recover any penalty or damages in respect of any infringement of copyright unless he shows that he has taken all precautions to ensure the marking of the article or that the infringer had knowledge of the existence of the copyright in the design.

Registration does not in fact give any exclusive right to the registered proprietor. What it gives is the right to stop the other from infringing his registration by making, applying the design or importing articles bearing the design and so on. Registration is not a guarantee of its validity since the official novelty search is a very limited one.

Infringement of Copyright

Infringement of copyright is a design-piracy of registered design. Infringement of a copyright in Design is termed as “Piracy of a registered Design”. It is not lawful for any person during the existence of copyright to do the following acts without the consent or licence of the registered proprietor of the design. Section 58 lays down that the following act amount to piracy:

- (i) to publish or to have it published or expose for sale any article of the class in question on which either the design or any fraudulent or obvious imitation has been applied.

- (ii) to either apply or cause to apply the design that is registered to any class of goods covered by the registration, the design or any limitation of it.
- (iii) to import for the purpose of sale any article belonging to the class in which the design has been registered and to which the design or a fraudulent or obvious imitation thereof has been applied.

In fact, any unauthorized application of the registered design or a fraudulent or obvious imitation thereof to any article covered by the registration for trade purpose or the import of such articles for sale is a piracy or infringement of the copyright in the design.

Meaning of Fraudulent/Obvious Imitation. A distinction is made between fraudulent and 'obvious imitation'. The only common factor between the two is that both should be imitations. Thus, even in the case of fraudulent imitation the design applied must be an imitation of the registered design. In a fraud the imitation has been made with the intention to deceive another person with the knowledge that what is being done is a violation of the other person's right. Where therefore, fraudulent imitation is established even if the imitation is rather clumsy and not obvious, the court will declare it as an infringement of copyright in the design. There must be exact duplication, an imitation of the registered design. Nothing less than imitation is sufficient to establish piracy.

Fraudulent imitation must mean this "If a man knowing that the pattern is a registered design, goes and imitates it, and does that without sufficient invention on his own part, that would be fraudulent imitation, if in fact it is an imitation (an exact copy of the registered design)".

Test to Determine whether Infringement. The court has to determine whether the alleged infringement has the same shape or pattern and must eliminate the claim of similarity due to similarity of functions, e.g., similarity of functions would result when two articles have same shape due to the inherent nature of goods, two pens will necessarily be similar in having an ink-tube, a cap and a nib for writing. This element of functional similarity is to be eliminated. The judge has to look at the two articles and check out their similarities and differences and through the eyes of a person with average intelligence see whether the defendant's article is substantially different from that of the plaintiff.

Judicial Remedy. The judicial remedy for infringement of registered design recommended in the Act is damages along with an injunction. Section 53(2) stipulates remedy in the form of payment of a certain sum of money by the person who pirates a registered design. A suit in the appropriate manner for seeking the relief in the form of an injunction is also recommended.

Jurisdiction of the Court. A suit under Section 53 is to be instituted in District Court or a High Court depending upon the quantum of damages claimed. The provisions of this section do not exclude action for passing off and for rendition of accounts. A person complaining infringement of his design can certainly ask for accounts from the defendant to show the profits earned by the defendant would be the loss sustained by him which he could claim as damages. A suit for injunction restraining infringement of registered design and for rendition of accounts is therefore maintainable only when filed in the appropriate court.

Burden of Proof. The general principle of law is that the party making the charge, i.e. accusing another party of an act has to establish the occurrence of such an act. The burden of proof is thus on the plaintiff who brings an action to establish the fact of piracy of his design. The facts which a plaintiff has to establish to prove piracy of a design are:

- The copyright in the design exists on the date of piracy.
- The design or a fraudulent or an obvious imitation thereof has been applied to the article or class of articles/goods for which his design is registered.
- The design or its imitation has been applied without the licence or writing consent of the registered proprietor.
- The article to which the design has been applied comes within the scope of description of goods covered by registration.

BRAND IMITATION

- The application of the design by the pirator has been made for the purpose of sale of the article, i.e., to gain commercial benefit from the act of infringement.
- The defendant has applied the design or caused the design to be applied or done anything with a view to enable the design to be so applied to the article or the defendant has imported for the purpose of sale the article bearing the design in its imitation without the consent of the registered proprietor or the defendants had published or exposed or caused to be published or exposed for sale the offending article knowing that it is a pirated or infringing article.

Reciprocal Arrangement with U.K. and Other Commonwealth Countries

Section 78A incorporates an arrangement with United Kingdom and other Commonwealth countries.

Accordingly, an application made for protection of any industrial design under Indian Designs Act 1911, shall be in priority to other applicants and shall have the same date as the date of application in the United Kingdom, provided that:

- the application is made within 6 months from the application for protection in the United Kingdom, and
- nothing in this section shall entitle the proprietor of the design to recover damages for infringement happening prior to the actual date on which the design is registered in India.

INDIAN PENAL CODE**Introduction**

The Act is known as Indian Penal Code, 1860 and extends to the whole of India except the state of Jammu and Kashmir. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

Dealing in Counterfeit Products

Dealing in counterfeit products is an offence under the Indian Penal Code.

Section 28 of this Code provides "a person is said to counterfeit who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised. It is not essential that an imitation need be exact. If the resemblance causes another to be deceived, it is sufficient to say act of counterfeiting has been committed.

Thus, this code has considered goods to be counterfeit if the resemblance is total or near total. In other words "Counterfeits" include pass-offs for the purposes of the Code.

Dishonesty and fraud are not the essential, pre-requisites of counterfeiting. As cited above intention to practise deception or knowledge that deception is likely to be thereby practised is alone sufficient. That intention may now, since the enactment of 1889, be presumed if the resemblance is such that deception may, in fact, be produced.

Counterfiet under the code not only covers registered trademarks but also unregistered marks. This code refers to such marks as property marks.

Property Mark: A mark used for denoting that movable property belongs to a particular person is called a property mark. (Sec. 479). The distinction between "trade-mark" and "property mark" is peculiar to this Code; it is non-existent in English law. The distinction is important, because its infringement entails the penalty prescribed in Sec. 481 and a property mark, unlike a trademark, need not be either registered or protected, so as to entitle the owner to proceed against persons falsely using it.

A trademark is a mark for denoting that goods are the manufacture or merchandise of a particular person. A property mark is a mark used for denoting that movable property belongs to a particular person.

The one refers to ownership of a symbol; the other, to rights in property. But both the trade and property marks have the same purpose in view, namely, the protection of one's goods against their fraudulent imitation by another, and both may be used by the manufacturer as well as the merchant. For example, the Singer Manufacturing Co. are known to make both sewing machines as well as bicycles and it is conceivable that they might make motor Cars, swords and cutlery as well. Now, they have distinct marks for each of their goods which is their trade mark, but they may choose to designate all their goods as "Singer's make" to distinguish them from similar goods manufactured by other makers, in which case the expression "Singer's make" would become their property mark entitled to protection under this section.

So again, a merchant may stamp his wares with his own name or with any device, though they may not bear any recognized trademark, in which case the impression would be his property mark within the meaning of this section. The National Bank of India imported from England, for sale in India, bars of gold of uniform touch, weight and size, with the words "National Bank of India" impressed thereon in Gujarati, as "Nasranna Bank" which, on account of their uniform quality obtained special value in the market. The accused placed on the market similar bars of gold marked "Nasranna Bank", whereupon he was prosecuted under Sec. 481; and the question was whether the National Bank had any property mark in the bars. It was contended for the accused that the term was flexible being intended to denote a mark impressed to denote that a certain thing was one's own property and that the moment it ceased to belong to the owner by whom the mark had been impressed, the property mark ceased to be so; or, in other words, the property mark ceased with the ownership of goods. But as the court remarked: "This interpretation assumes that a property mark put upon any article by any person to denote his ownership is confined to that article and no other property belonging to him. But I think that property mark is intended to denote ownership over all movable property belonging to him whether it is all of one kind or different kinds. So long as the person owns movable properties, his property mark which has been or may be impressed upon them remains his, though any particular article out of it may after such impression pass out of his hands and cease to be his".

Property mark must, however, relate to movable property. The term "movable property" does not include incorporeal property. The term here is used collectively as denoting goods of a person. The term is, moreover, wide enough to include one class or species of properties belonging to a single owner. So in the case cited above, though the National Bank may have impressed a large number of bars with their distinctive property mark, the fact that some of them were sold, and replaced by others bearing the same mark, would not, in any way, affect the bank's right to the property mark which, like the trademark, acquires all these essential attributes of property so as to be capable of assignment and protection.

Ordinarily, a property mark is used for the same purpose as a trademark, and the expression "belonging to a particular person" does not necessarily imply his ownership. For instance, suppose that the gold bars imported by the National Bank were tested by a firm of assayers of repute say AB, who impressed thereon their name as indicating that the gold was of a certain uniform quality, and these bars were then further impressed by the National Bank, would not AB's impression on the bars be as much a property mark as that of the National Bank has been held to be?

The distinction between a trade-mark and a property mark is that whereas the former denotes the manufacture or quality of the goods to which it is attached, the latter denotes the ownership in them.

Dealing in False Property Mark

Using a False Property Mark (Sec.481). Whoever marks any movable property or goods or any case, package or other receptacle containing movable property or goods, or use any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods, contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Punishment for using a False Property Mark (Sec-482). Whoever uses any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term, which may extend to one year, or with fine, or with both.

This section prescribes punishment for using a false trade or property mark. But a person may use a false trade description as distinct from a false trademark in which case the act is not a code offence though punishable under the provisions of the Trade Marks Act.

In ordinary offences under the code the burden of proving *mens rea* or criminal intent is on the prosecution, and it lies on it to prove all the elements necessary to bring the offence home to the accused. But in these quasi-crimes, law presumes fraudulent intent from an imitation, which is reasonably calculated to deceive. The proof of fraudulent intent is unnecessary. At the same time, the presumption it creates is rebuttable and may be rebutted by the accused who may prove that he had acted innocently and that he had no such intent. The intent to defraud is thus still an essential element of the offences but the code makes a departure from the ordinary rule by inferring it from the fact of imitation. The question, therefore, affects proof but not the principle.

False Trademark and Counterfeiting Trademark. The distinction between false trademark and counterfeit trademark is somewhat subtle. It depends on the degree of resemblance between the false and the genuine trademarks. The offence under Sec. 482 will be complete as soon as a false trademark has been used but under Sec. 486 it is necessary that the goods should be sold or be possessed or exposed for sale.

It is not permissible to hold that the imprinting of a fictitious mark does not amount to counterfeiting. It is by no means necessary that there should be absolute identity. The proper test is whether the general get-up is likely to deceive the unwary purchaser.

Procedure. A prosecution for an offence under this section must be instituted within three years of the commission of the offence, or one year of its discovery by the prosecutor, whichever period first expires. This offence is non-cognizable, but a warrant should, ordinarily, issue in the first instance. It is bailable, and compoundable with the permission of the court and is triable by any Magistrate.

An infringement of one's trademark by another in manner calculated to deceive gives rise to a liability which may be enforced either by a prosecution under the code or by a civil suit for an injunction and damages. The evidence required in each case is the same and though beyond prescribing a rule of limitation for the institution of criminal proceedings, the legislature has given no indication of when the party aggrieved should be entitled to resort to one proceeding rather than another, yet it is evident that the dual remedies to which the aggrieved party becomes entitled cannot be resorted to at his sole discretion. It would seem that the first and foremost thing that the criminal court has to see is that a party coming to it for redress does so promptly. If there was any undue delay it will refer the complainant to the civil court rather than allow its process to be abused by dilatory proceeding. So it was observed in Madras: "Ordinarily the infringement of trademark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the legislature, in its anxiety to protect traders, has allowed resort to the criminal courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. But apart from laches and delay, the nature of the dispute may be one more suitable for adjudication by the civil rather than the criminal court."

Counterfeiting a Property Mark used by Another (Sec. 483). Section 483 of this code provides "whoever counterfeits any property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

This section differs from the last (Sec. 482) in that the accused in committing this offence goes to the length of forging another man's trademark for the purpose of imposition, which accounts for the enhanced punishment.

Counterfeiting a Trademark. The question what amounts to the counterfeiting of a trademark is a question of degree. For, having regard to the use of the term "counterfeiting" in another connection, the counterfeit need not be the exact copy of the original. At the same time the two must possess some features in common; otherwise one cannot be called a counterfeit of the other. As used in connection with trademark the term is probably used in a somewhat special sense as implying the exact reproduction of a trademark for the purpose of attracting customer. The term has obviously no application to the use of a receptacle bearing the original trademark for enclosing goods of another make. Nor would it extend to a trademark which is merely a colourable imitation of another but which otherwise possesses features intended to distinguish it from the original. The question then resolves itself into this: what does the appearance of the two trademarks suggest? Did the spurious trademarker intend to impose on the public by the similarity of his design or did he intend to use it as the original?

But this distinction is somewhat too fine; and in practice the prosecution prefers to charge the accused both under Sec. 482 as well as under this section and Sec. 486.

Procedure. No prosecution can be instituted under this section on expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever period first expires. The offence is non-cognizable but a warrant should, ordinarily, issue in the first instance. It is bailable and compoundable with the permission of the court and is triable by any Magistrate. The costs of the prosecution or defense may be ordered to be paid by the Court at the close of the trial, and such costs would then be recoverable as fine. It has also the power to order forfeiture of goods in accordance with the provisions of the Trade Marks Act.

Selling Goods Marked with a Counterfeit Property Mark (Sec. 486). Section 486 of this code provides whoever sells or exposes or has in possession for sale, any goods or things with a counterfeit property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall unless he proves —

- (a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence on reason to suspect the genuineness of the mark, and.
- (b) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things, or.
- (c) that otherwise he had acted innocently, be punished with imprisonment of either description for a term, which may extend to one year, with fine, or with both.

This section may be said to constitute abetment of the offence in Sec. 482, for while the latter section punishes the user of a false trade or property mark who may be either the manufacturer or the wholesale importer or merchant, this section extends its penalty to those who promote the circulation or consumption of such goods but for whose co-operation they might not secure the necessary market.

The provisions of this section are aimed at a retailer who connives with a fraudulent wholesaler or manufacturer to palm off on an unsuspecting public goods which purport to be other than what they are. It has no application to a retailer who makes no attempt at substitution but offers the spurious article at a lower price as being different and cheaper article.

It is not necessary to constitute an offence that the label should be exactly identical provided there is similarity between the two so as to mislead an unsuspecting customer; the requirement of the law is satisfied. But when the complainant has not proved that this label had been in existence for 10 to 12 years as suggested by him, it is not possible to hold that the accused has committed an infringement of the label.

For the purpose of Sec. 486, it is not necessary that the mark in question should be the exclusive property of anybody. The only consideration, which is of importance with reference to the provisions of Sec. 486 is, whether the mark in question has come to be so identified with the merchandise of the person using the mark as to be regarded in the market as a distinctive mark to denote that particular merchandise.

Conclusion

An accused would render himself liable to conviction under Sec. 482, if he uses a false trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under Sec. 486 is the sale or exposing or possessing for sale goods or things with a counterfeit trade-mark. The offence under the first section will be complete as soon as a false trademark has been used, but under the latter section it will be necessary that goods should or be possessed or exposed for sale. It is, therefore, perfectly legal to sustain a conviction under both the sections.

DRUGS AND COSMETICS ACT

The Act is called the Drugs [and Cosmetics] Act, 1940. It extends to the whole of India. This Act regulates the import, manufacture, distribution and sale of drugs [and Cosmetics].

Definitions

Cosmetic. The word "cosmetic" means any article intended to be rubbed, poured, or sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance and includes any article intended for use as a component of cosmetic.

Drug. The word "Drug" means:

- (i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes.
- (ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of [vermin or] insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the *Official Gazette*.
- (iii) all substances intended for use as components of a drug including empty gelatin capsules; and
- (iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the *Official Gazette*, after consultation with the Board.

Manufacture. The word "manufacture" in relation to any drug [or cosmetic] includes any process or part of a process for making, altering, ornamenting, finishing, packing, labelling, breaking up or otherwise treating or adopting any drug [or cosmetic] with a view to its sale [or] distribution but does not include the compounding or dispensing [of any drug, or the packing of any drug or cosmetic] in the ordinary course of retail business; and "to manufacture" shall be construed accordingly.

Spurious Cosmetic and Drug. Under this law, a counterfeit cosmetic or drug produced is considered "Spurious". A spurious drug or cosmetic is one that is manufactured under a name, which belongs to another drug or cosmetic or is an imitation of another drug or cosmetic.

Condition for Cosmetic or Drug to be Spurious

Section 17B and 17D of this Act provides, For the purposes of this chapter [chapter IV, Manufacture, Sale and Distribution of Drugs (and cosmetics)], a drug [or cosmetic] shall be deemed to be spurious —

- (a) if it is manufactured under a name which belongs to another drug [or cosmetic]; or
- (b) if it is imitation of or is a substitute for, another drug or resembles another drug [or cosmetic] in a manner likely to deceive or bears upon it or upon its label or container the name of another drug [or cosmetic] unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug [or cosmetic]; or

- (c) if the label or container bears the name of an individual or a company purporting to be the manufacturer of the drug [or cosmetic], which individual or company is fictitious or does not exist; or
- (d) if it purports to be the product of a manufacturer of whom it is not truly a product.

Action against Spurious Cosmetic and Drug

If a cosmetic or drug is spurious the Food and Drug Administration (FDA) of the State where it is manufactured or sold, is empowered to cancel the licence issued by such an authority. Therefore, consumers or consumer bodies should inform the local office of FDA or local Inspector from the office of FDA about counterfeit cosmetic and request him to prohibit such a sale in the territory of their jurisdiction.

Also, the aggrieved consumer or recognised consumer association is empowered to file a complaint under Section 32 of the Act before a Metropolitan Magistrate or First class Judicial Magistrate against the seller or manufacturer of counterfeit or pass-off cosmetic or drug products.

Sections 32 of this Act provides for "cognizance of offences". It states —

- (i) No prosecution under this chapter (chapter IV of the Act) shall be instituted except by an Inspector [or by the person aggrieved or by a recognized consumer association whether such person is a member of that association or not.]
- (ii) No court inferior to that of [a Metropolitan Magistrate or of a Judicial Magistrate of the first class] shall try an offence punishable under this chapter.
- (iii) Nothing contained in this chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this chapter.

If the court deems it fit, the manufacturer of such spurious cosmetic or drug products can be impleaded as well under Section 32A.

Section 32A of this Act provides for "Power of court to implead the manufacturer, etc." It states where, at any time during the trial of any offence under this chapter alleged to have been committed by any person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, the court is satisfied, on the evidence adduced before it, that such manufacturer or agent is also concerned in that offence, then, the court may, notwithstanding anything contained [in sub-sections (1), (2) and (3) of Section 319 of the code of criminal procedure, 1973 (2 of 1974)], proceed against him as though a prosecution had been instituted against him under Section 32.

THE PREVENTION OF FOOD ADULTERATION ACT

Introduction and Definitions

The Act is called the Prevention of Food Adulteration Act, 1954 and makes provision for the prevention of adulteration of food. It extends to the whole of India.

In this Act unless the context otherwise requires —

- (1) "Adulterant" means any material, which is or could be employed, for the purposes of adulteration;
- (2) "Adulterated" — an article of food shall be deemed to be adulterated —
 - (a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice or is not of the nature, substance or quality which it purports or is represented to be;
 - (b) if the article contains any other substance which affects or if the article is so processed as to affect, injuriously the nature, substance or quality thereof;
 - (c) if any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature, substance or quality thereof;

BRAND IMITATION

- (d) if any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof;
- (e) if the article has been prepared, packed or kept under insanitary conditions whereby it has become contaminated or injurious to health;
- (f) if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or vegetable substance or is insect-infected or is otherwise unfit for human consumption;
- (g) if the article is obtained from a diseased animal;
- (h) if the article contains any poisonous or other ingredient which renders it injurious to health;
- (i) if the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health;
- (j) if any colouring matter other than that prescribed in respect thereof is present in the article, or if the amounts of the prescribed colouring matter which is present in the article are not within the prescribed limits of variability;
- (k) if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;
- (l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which renders it injurious to health.
- (m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health.

Provided that, where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability, in either case solely due to natural causes and beyond the control of human agency then such article shall not be deemed to be adulterated within the meaning of this sub-clause.

- (3) "Food" means any article used as food or drink for human consumption other than drug and water and includes:
 - (a) any article which ordinarily enters into, or is used in the composition or preparation of human food;
 - (b) any flavouring matter or condiments; and
 - (c) any other article which the Central Government may, having regard to its use, nature, substance or quality declare, by notification in the *Official Gazette*, as food for the purpose of this Act;
- (4) "Manufacture" includes any process incidental or ancillary to the manufacture of an article of food.
- (5) "Misbranded" - an article of food shall be deemed to be misbranded.
 - (a) if it is an imitation of or is a substitute for or resembles in a manner likely to deceive another article of food under the name of which it is sold and is not plainly and conspicuously labelled so as to indicate its true character;
 - (b) if it is falsely stated to be product of any place or country;
 - (c) if it is sold by a name which belongs to another article of food;
 - (d) if it is so coloured, flavoured or coated, powdered or polished that the fact that the article is damaged is concealed or if the article is made to appear better or of greater value it really is;

- (e) if false claims are made for it upon the label or otherwise;
 - (f) if, when sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer and which bear his name and address, the contents of each package are not conspicuously and correctly stated on the outside thereof within the limits of variability prescribed under this Act;
 - (g) if the package containing it; or the label on the package bears any statement design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular; or if the package is otherwise deceptive with respect to its contents;
 - (h) if the package containing it or the label on the package bears the name of a fictitious individual or company as the manufacturer or producer of the article;
 - (i) if it purports to be, or is represented as being, for special dietary uses, unless its label bears such information as may be prescribed concerning its vitamin, mineral or other dietary properties in order sufficiently to inform its purchaser as to its value for such uses.
 - (j) if it contains any artificial flavouring, artificial colouring or chemical preservative, without a declaratory label stating that fact or in contravention of the requirement of this Act or rules made thereunder.
 - (k) if it is not labelled in accordance with the requirements of this Act or rules made thereunder.
- (6) "Package" means a box, bottle, casket, tin, barrel, case, receptacle, sack, bag, wrapper or other thing in which an article of food is placed or packed;
- (7) "Premises" includes any shop, stall or place where any article of food is sold or manufactured or stored for sale;
- (8) "Sale" with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt also an attempt to sell any such article;
- (9) the words "unwholesome" and "noxious" when used in relation to an article of food mean respectively that the article is harmful to health or repugnant to human use.

Thus, counterfeit or pass-off packaged food products are termed as "misbranded" articles of food under this law.

Prohibition of Sale of Manufacture of Misbranded Food Articles

Section 7 of the Act prohibits sale of manufacture of misbranded food articles. It provides for prohibition of manufacture, sale, etc., of certain articles of food. It states —

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute-

- (i) any adulterated food;
- (ii) any misbranded food;
- (iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;
- (iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority [in the interest of public health];
- (v) any article of food in contravention of any other provisions of this Act or of any rule made there under; or
- (vi) any adulterant

Analysis of food. The consumers or consumer bodies can get the counterfeit article of food tested by the public analysts appointed in his behalf by the Government under Section 8 of the Act. The Central Government or the State Government may, by notification in the *Official Gazette*, appoint such persons as it thinks fit, having the prescribed qualifications to be public analysts for such local areas as may be assigned to them by the Central Government or the State Government, as the case may be:

Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be appointed to be a public analyst under this section. Different public analysts may be appointed for different articles of food.

The Central Government or the State Government may, by notification in the *Official Gazette*, appoint such persons as it thinks fit, having the prescribed qualifications to be food inspectors for such local areas as may be assigned to them by the Central Government or the State Government, as the case may be.

Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be appointed to be a food inspector under this section.

Every food inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code [45 of 1860] and shall be officially subordinate to such authority as the Government appointing him, may specify in this behalf.

Power of food inspectors

(1) A food inspector shall have power

- (a) to take samples of any article of food from —
 - (i) any person selling such article;
 - (ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee;
 - (iii) a consignee after delivery of any such article to him; and
- (b) to send such sample for analysis to the public analyst for the local area within which such sample has been taken;
- (c) with the previous approval of the local (Health) authority having jurisdiction in the local area concerned or with the previous approval of the Food (Health) Authority, to prohibit the sale of any article of food in the interest of public health.

Procedure to be followed by food inspectors

(1) When a food inspector takes a sample of food for analysis, he shall —

- (a) give notice in writing then and there of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed under Section 14A;
- (b) except in special cases provided by rules under this Act, divide the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed.

Provided that where such person refuses to sign or put his thumb impression the food inspector shall call upon one or more witnesses and take his or their signatures or thumb impressions, as the case may be, in lieu of the signature of thumb impression of such person;

- (i) send one of the parts for analysis to the public analyst under intimation to the local (Health) Authority; and
- (ii) send the remaining two parts to the local (Health) Authority for the purpose of sub-section (2) of this section and sub-sections (2A) and (2E) of Section 13.

- (2) Where the part of the sample sent to the public analyst under sub-clause (i) of clauses (c) of sub-section (i) is lost or damaged the local (Health) Authority shall, on a requisition made to it by the public analyst or the food inspector dispatch one of the parts of the sample sent to it under sub-clause (ii) of the said clause (c) to the public analyst for analysis;
- (3) When a sample of any article of food [or adulterant] is taken under sub-section (1) or sub-section (2) of Section 10, [the food inspector shall, by the immediately succeeding working day, send a sample of the article of food or adulterant or both, as the case may be] in accordance with the rules prescribed for sampling to the public analyst for the local area concerned.
- (4) An article of food seized under sub-section (4) of Section 10, unless destroyed under sub-section (4A) of that section, and any adulterant seized under sub-section (6) of that section, shall be produced before a magistrate as soon as possible and in any case not later than seven days after the receipt of the report of the public analyst.

Provided that if an application is made to the magistrate in this behalf by the person from whom any article of food has been seized, the magistrate shall, by order in writing direct the food inspector to produce such article before him within such time as may be specified in the order.

- (5) If it appears to the magistrate on taking such evidence, as he may deem necessary-
 - (a) that the article of food produced before him under sub-section (4) is adulterated or misbranded, he may order it —
 - (i) to be forfeited to the Central Government, the State Government or the local authority, as the case may be; or
 - (ii) to be destroyed at the cost of the owner or the person from whom it was seized so as to prevent its being used as human food; or
 - (iii) to be so disposed of as to prevent its being again exposed for sale or used for food under its deceptive name; or
 - (iv) to be returned to the owner, on his executing a bond with or without securities for being sold under its appropriate name or, where the magistrate is satisfied that the article of food is capable of being made to conform to the prescribed standards for human consumption after reprocessing, for being sold after reprocessing under the supervision of such officer as may be specified in the order.
 - (b) that the adulterant seized under sub-section (6) of Section 10 and produced before him is apparently of a kind which may be employed for purposes of adulteration and for the possession of which the manufacturer, distributor or dealer as the case may be, is unable to account satisfactorily, he may order it to be forfeited to the Central Government, the State Government or the local authority, as the case may be.
- (6) If it appears to the magistrate that any such —
 - (a) article of food is not adulterated: or
 - (b) adulterant which is purported to be an adulterant is not an adulterant.

The person from whose possession the article of food or adulterant was taken shall be entitled to have it restored to him and it shall be in the discretion of the magistrate to award such person from such fund as the State Government may direct in this behalf, such compensation not exceeding the actual loss which he has sustained as the magistrate may think proper.

Further, the aggrieved consumer has a right to demand through the food inspector, the infringer to disclose the name and address and other particulars of persons from whom the infringer bought the articles of food. This is provided under Section 14A of the Act.

Penalties

Section 16 of this Act Provides:

- (1) Subject to the provisions of sub-section (1A), if any person-
- (a) whether by himself or by any other person on his behalf, imports into India or manufactures for sale, or stores, sells or distributes any article of food.
 - (i) which is adulterated within the meaning of sub-clause (m) of clause (ia) of Section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the food (Health) Authority;
 - (ii) other than an article of food referred to in sub-clause (i) in contravention of any of the provisions of this Act or of any rule made thereunder, or
 - (b) whether by himself or by any other person on his behalf, imports into India or manufactures for sale, or stores, sells or distributes any adulterant which is not injurious to health; or
 - (c) prevents a food inspector from taking a sample as authorised by this Act; or
 - (d) prevents a food inspector from exercising any other power conferred on him by or under this Act; or
 - (e) being a manufacturer of an article of food, has in his possession or in any of the premises occupied by him, any adulterant which is not injurious to health; or
 - (f) uses any report or certificate of a test or analysis made by the Director of the Central Food Laboratory or by a public analyst or any extract thereof for the purpose of advertising any article of food; or
 - (g) whether by himself or by any other person on his behalf gives to the vendor a false warranty in writing in respect of any article of food sold by him.

He shall, in addition to the penalty to which he may be liable under the provisions of Section 6, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years, and with fine which shall not be less than one thousand rupees.

Also the consumer or consumer bodies can lodge a complaint with the police. who on their own can take the infringer into custody under Section 20 of the Act.

CONSUMER PROTECTION ACT

Introduction

The consumer is the forgotten man of the modern Indian economy. In general, consumers are scattered over the country, least organised and generally taken for granted as one who has anyhow to buy in order to live. Besides, they have an additional handicap, namely, majority of consumers are ignorant and usually lack information to make intelligent purchases. In many cases, they are incompetent to protect their interests, particularly when they deal with fully organised, united and well-informed professional sellers.

In our country, where the majority of consumer is illiterate and ill-informed and have limited purchasing power and are not in a position to meet the basic necessities of life. Adulteration, variation in the contents of the pack, use of deceptively similar names/marks or deceptive advertising claims are all the ways and means by which the consumer is exploited to the maximum extent possible.

In economics, it is said that the act of production is not complete until the commodity is in the hands of the ultimate consumer. All production is, in fact, for consumption directly or indirectly. It is true that consumption should be the sole end and purpose of all production. In a free market economy, it is said

that consumer is the king. He communicates his decision or wish through price, every rupee representing a ballot paper and the prime regulator of our economic life.

In reality, consumer is not a king. At the most, he is a prince without a privy purse and is often indistinguishable from a serf or a pauper. He pays more and earns much less in the real terms. He is the one who is often cheated and fleeced-even given shoddy and adulterated goods.

Thus, there is great need for consumer protection, consumer guidance and consumer education in our country. Consumer seeks protection, advice and information when his rights are adversely affected. The shift from buyer beware to seller beware has increased the role of government in promoting the consumer's right to safety, the right to be informed, the right to choose, the right to be heard, the right to seek redressal and right to consumer education. These consumer rights constitute Consumer Bill of Rights. In 1962, President John F. Kennedy, in his consumer message, summed up these rights of consumers and paved the way for organised consumerism in the U.S.A. and all over the world.

The Indian Parliament enacted the Consumer Protection Act in December, 1986. It came into force on April 15, 1987. The object of the legislation, as the preamble of the Act proclaims, is "for better protection of the interests of consumers". The Act was amended in 1993. The Amendment Act has tried to plug loopholes and enlarge the scope of area covered, and entrust more powers to the consumer courts.

What is Consumer Protection?

Meaning of Consumer Protection

- *Consumer protection means the physical protection of the consumer, for e.g. protection against products that are unsafe or endanger the health.*
- *Consumer protection means the protection of the consumer against deceptive and unfair trade practices. Consumer must have adequate rights and means of redress against business malpractices and frauds.*
- *Ecological and environmental effects of chemical, fertiliser or refinery complexes pollute water, air and food and endanger human life. Consumer wants due protection against all types of pollution. Consumer wants a healthy environment free from pollution.*
- *Consumer protection means adequate protection of consumer against the abuse of monopoly position and/or restrictive trade practices. Protection delayed is protection denied.*

Box 4.3

Why Consumer Protection?

Consumer protection is essential for a healthy economy. Greater and free competition in the market is of definite advantage to the consumer. Competition can reduce prices, enhance quality and stimulate innovation in product-mix and marketing-mix. Innovation means progress and progress means life, a prosperous life. Competition is the dispenser of justice to the consumer and producer alike.

The "Why" of consumer protection is clearly evident from the following:

- (i) Consumer has no voice in the product, which is manufactured for his consumption. Hence, consumer naturally demands the existence of fair trade practices, which would ensure physical safety when he consumes the product. Similarly, fair trade practices will enable him to get the real value for his money.

- (ii) It is very difficult to effectively organize consumers in country as vast as India. The backwardness of people is a further obstacle to consumer organization.
- (iii) A majority of the population is illiterate and ignorant.
- (iv) Poverty, lack of education, lack of information outlook of Indians to suffer in silence, considering poverty and misery as a God-given things — all these negative sides of life have enabled unscrupulous businessman to exploit consumers. To prevent this ruthless exploitation, a forceful well-organised consumerism or consumer movement coupled with Government support and patronage in the form of special legislation is needed.
- (v) The advancement in science and technology has increased the difficulties of the consumer along with opportunities of selection from a very wide variety of goods. Increasing technical complexity of consumer goods, especially those containing machinery clearly points out that consumers cannot know the ins and outs of such goods.

Consumer choice is influenced by mass advertising and other promotional devices, utilising highly developed art of persuasion. Most of the advertising and promotion CAMPAIGNS today are deceptive or misleading. Hence, consumer cannot know that, the brand is original or is advertised by the original manufacturer and whether the drug preparations meet the minimum standards of safety, quality and efficacy. He usually does not know whether one processed food has more nutritional value than another. He may not know whether the performance of a product will in fact meet his needs or whether the large economy size, or the best buy is really a bargain.

Therefore, in the present and complicated market, consumers do need protection against fake products, deceptive and misleading advertisements and sales promotion devices etc.

Important Definitions

Consumer. The term Consumer as per Section 2(1)(d) of the Act, means any person who —

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payments, when such services are availed of with the approval of the first-mentioned person.

“Commercial Purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

Consumer Dispute. Sec. 2(1)(e) of the Consumer Protection Act defines “Consumer Dispute” as — a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

Defect. As per Sec. 2(1)(f) of the Act “defect” means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force of [under any contract, express or] implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.